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No. 08-____

IN THE
Supreme Court of the United States

FRANK D. WUTERICH,
Staff Sergeant, United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute authorizing an interlocutory prosecution appeal of a ruling "which excludes evidence" grants the Article I military appellate courts jurisdiction to reverse an order quashing a subpoena.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATUTES AND REGULATIONS INVOLVED 1
STATEMENT 1
REASONS FOR GRANTING THE PETITION 6
A. A ruling quashing a subpoena does not fall within Congress's limited authorization for prosecution appeals in the military justice system 8
B. The Question Presented is important and warrants this Court's review 11
CONCLUSION 14
APPENDIX 1a
Court of Appeals for the Armed Forces Decision 1a
Court of Appeals for the Armed Forces Order 51a
Navy-Marine Corps Court of Criminal Appeals Decision 52a
Relevant Statutes and Rules 66a

TABLE OF AUTHORITIES

Cases

Bowen v. Massachusetts,
487 U.S. 879 (1988) 9

C.I.R. v. McCoy,
484 U.S. 3 (1987) 9

Clinton v. Goldsmith,
526 U.S. 529 (1999) 9, 13

Denedo v. United States,
66 M.J. 114 (C.A.A.F. 2008) 7, 11, 13

In re Grand Jury Empanelled (Colucci),
597 F.2d 851 (3d Cir. 1979) 6

In re Grand Jury Subpoenas (Kiefaber),
774 F.2d 969 (9th Cir. 1985) 6

Loving v. United States,
62 M.J. 235 (C.A.A.F. 2005) 9

United States v. Browers,
20 M.J. 356 (C.M.A. 1985) 5, 8, 11

United States v. Camisa,
969 F.2d 1428 (2d Cir. 1992) 6

United States v. Hickey,
185 F.3d 1064 (9th Cir. 1999) 6

United States v. Monsanto,
491 U.S. 600 (1989) 8

United States v. Watson,
386 F.3d 304 (1st Cir. 2004) 4, 5, 6

United States v. Wilson,
420 U.S. 332 (1975) 5, 9

Will v. United States,
389 U.S. 90 (1967) 5

Statutes

10 U.S.C. § 810 12

10 U.S.C. § 862 ..... passim

10 U.S.C. § 892 2

10 U.S.C. § 919 2

10 U.S.C. § 928 2

10 U.S.C. § 934 2

18 U.S.C. § 3731 ..... passim

Other Authorities

H.R. Rep. No. 98-549 (1983) 10

James Wm. Moore et al., *Moore's Federal Practice*
(3d. ed. 2008) 3

Norman J. Singer, *Sutherland Statutes and*
Statutory Construction (6th ed. 2000) 9

Petition for Certiorari, *United States v. Denedo*, No. 08-267 ..... 11, 13

Rule for Courts-Martial 908 drafters' analysis, app. 21, MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ed.) 11, 12

S. Rep. No. 98-53 (1983) 4, 10, 11

Wayne R. LaFave et al., *Criminal Procedure* (3d. ed. 2007) 3, 5, 9

Rules

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID 801 (2008 ed.) 8

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (2008 ed.) 12, 13

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 908 (2008 ed.) 12

PETITION FOR A WRIT OF CERTIORARI

Staff Sergeant Frank D. Wuterich, United States Marine Corps, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-50a) is reported at 67 M.J. 63. The opinion of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 52a-65a) is reported at 66 M.J. 685.

JURISDICTION

The Court of Appeals for the Armed Forces' judgment was entered on November 17, 2008. A petition for reconsideration was denied on December 12, 2008. App., *infra*, 51a. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATUTES AND REGULATIONS INVOLVED

Articles 10 and 62 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 810, 862; the Criminal Appeals Act, 18 U.S.C. 3731; and Rules for Courts-Martial 707 and 908, *Manual for Courts-Martial, United States* (2008 ed.), are set out in Appendix D.

STATEMENT

This case concerns the statutory jurisdiction of the military justice system's appellate courts—created by Congress pursuant to Article I of the Constitution—to hear interlocutory prosecution appeals challenging discovery rulings.

1. Petitioner, a staff sergeant in the United States Marine Corps, is being tried by a general court-martial on charges arising from combat operations in Iraq. On November 19, 2005, Petitioner led a squad of Marines on a convoy patrol in Haditha. As the convoy's Humvees passed, insurgents detonated a roadside bomb, killing one Marine and wounding others. Petitioner then led his squad in a clearing operation of two nearby buildings. As a result of that clearing operation and its aftermath, Petitioner faces charges under the Uniform Code of Military Justice of dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice. 10 U.S.C. 892 , 919 , 928, 934 (2000).

Charges were sworn against Petitioner on December 21, 2006. On March 18, 2007, the CBS News program "60 Minutes" televised a report about the events at Haditha. The segment included an interview that "60 Minutes" correspondent Scott Pelley taped with Petitioner in October 2006.

On December 27, 2007, charges against Petitioner were referred for trial by general court-martial. On January 16, 2008, military prosecutors issued a third-party subpoena to CBS Broadcasting Inc. The subpoena directed CBS to turn over to the prosecutors "all video and/or audio tape(s), to include out-takes and raw footage" of all interviews with and statements and actions of Petitioner "recorded by or for, or in the possession of, CBS News."

CBS turned over a tape of the March 18, 2007 broadcast report, but moved to quash the portion of the subpoena seeking audio and video that CBS had not aired. The military judge presiding over Petitioner's court-martial granted the motion to quash.

2. The prosecution filed an interlocutory appeal with the Navy-Marine Corps Court of Criminal Appeals on March 17, 2008. The prosecution invoked jurisdiction under Article 62(a)(1)(B) of the UCMJ, 10 U.S.C. 862(a)(1)(B), which provides that the United States may appeal an "order or ruling which excludes evidence that is

substantial proof of a fact material in the proceeding." Four days later, Petitioner moved to dismiss the appeal on both jurisdictional and timeliness grounds. CBS, participating in the case as what the Navy-Marine Corps Court dubbed a "non-party appellee," also moved to dismiss the appeal. The Navy-Marine Corps Court held that Petitioner had no standing to participate in the appeal and did not consider his submissions to the court. App., *infra*, 53a, 57a-59a. The court concluded that it had jurisdiction to review the military judge's ruling quashing the subpoena and reversed that ruling. *Id.* at 54a-57a, 60a-64a.

3. The CAAF vacated the Navy-Marine Corps Court's decision, unanimously holding that it had erred by concluding that Petitioner lacked standing to participate in the appeal. App., *infra*, at 12a-14a, 36a. The CAAF then proceeded to itself decide the substantive issues in the case. First, by a 3-2 vote, it held that Article 62 provides jurisdiction for the prosecution to file an interlocutory appeal challenging a trial judge's order quashing a subpoena. *Id.* at 15a-27a. The majority went on to reverse the order and remand the case for further proceedings to determine whether the subpoena should be quashed. *Id.* at 29a-34a.

a. The CAAF held that an order quashing a subpoena is appealable under Article 62(a)(1)(B) of the UCMJ.

The CAAF observed that the federal civilian "courts of appeals have addressed the meaning of the term 'excluding evidence' under 18 U.S.C. § 3731 and have concluded that the term includes an order quashing a subpoena." *Id.* at 20a (citing 25 James Wm. Moore et al., *Moore's Federal Practice* ¶ 617.08[4] (3d. ed. 2008); 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.3(c) (3d. ed. 2007)). While the CAAF acknowledged textual differences between 18 U.S.C. 3731, the federal civilian criminal appeals statute, and Article 62 of the UCMJ, it concluded "that application of guidance from the federal court decisions under 18 U.S.C. § 3731 is both practicable and appropriate. Under that

guidance, a ruling quashing a subpoena is appealable under Article 62, UCMJ." *Id.* at 25a.

The CAAF reasoned that Article 62's text "does not reflect that Congress used the word 'exclude' as a term of art limited to formal rulings on admissibility." *Id.* at 24a. The court "agree[d] with the approach taken" by the First Circuit in *United States v. Watson*, 386 F.3d 304 (1st Cir. 2004), a Section 3731 case, "which focused on the pool of potential evidence, not a formal ruling on admissibility." *Id.* at 25a. In *Watson*, observed the CAAF, the First Circuit concluded that 18 U.S.C. 3731 permits a prosecution appeal when "the order itself is the practical equivalent of a suppression or exclusion order; that is, when the order has the direct effect of denying the government the right to use evidence. If such an effect is only incidental, then there can be no appeal." *Id.* at 21a (quoting *Watson*, 386 F.3d at 311). The CAAF concluded that "[u]nder *Watson*, the pertinent inquiry is not whether the court has issued a ruling on admissibility, but instead whether the ruling at issue 'in substance or in form' has limited 'the pool of potential evidence that would be admissible.'" *Id.* at 22a (quoting *Watson*, 386 F.3d at 313).

Reviewing Article 62's legislative history, CAAF concluded that it "also does not reflect that Congress intended the word 'exclude' to be a term of art limited to rulings on admissibility." *Id.* at 25a. Relying on a Senate Armed Services Committee report, the CAAF found that "the purpose of Article 62, UCMJ, reflected in its structure and legislative history, [is] to provide the government in military cases with the same interlocutory appeal authority as in civilian criminal cases, 'to the extent practicable.'" *Id.* (quoting S. Rep. No. 98-53, at 23 (1983)).

After holding that Article 62(a)(1)(B) provided jurisdiction, the CAAF proceeded to the ruling's merits. The CAAF held that the trial judge abused his discretion by quashing the subpoena without first reviewing the outtakes in camera. *Id.* at 29a-34a. The court remanded the case for the trial judge to "order production of the requested

material for in camera inspection" before conducting further proceedings to determine whether the subpoena should be quashed. *Id.* at 36a.

b. Judge Ryan, joined by Judge Erdmann, dissented. *Id.* at 36a-50a. The dissent concluded that "because the Government's appeal in this case is an appeal of the military judge's ruling on a discovery motion—a ruling that expressly noted that the object of the discovery could be admissible—and not '[a]n order or ruling which excludes evidence,'" Article 62(a)(1)(B) provided no jurisdiction for an interlocutory prosecution appeal. *Id.* at 36a (footnote omitted). Judge Ryan observed, "[i]n criminal cases, prosecution appeals are not favored and are available only upon specific statutory authorization." *Id.* at 37a (citing *United States v. Wilson*, 420 U.S. 332, 336 (1975); 7 LaFave, *supra*, at §27.3(a)-(b)). Judge Ryan also noted that previous military case law "adopted a narrow construction" of the portion of Article 62 at issue. *Id.* (citing *United States v. Browers*, 20 M.J. 356, 359-60 (C.M.A. 1985)). "In *Browers*," Judge Ryan explained, "the Court differentiated appealable decisions from unappealable ones by asking whether the military judge made a ruling involving the admissibility of the evidence." *Id.* She added that *Browers*' "narrow view" of Article 62's "excluding evidence" provision is consistent with both *Wilson*'s "instruction that the government could only take an appeal in a criminal case if it had express statutory authority," *id.* at 39a (citing 420 U.S. at 336), and "the policy against piecemeal appeals in criminal cases, 'where the defendant is entitled to a speedy resolution of the charges against him.'" *Id.* (quoting *Will v. United States*, 389 U.S. 90, 96 (1967)).

Judge Ryan disagreed with the majority's interpretation of the First Circuit's opinion in *Watson*. *Watson*, she observed, held that a ruling denying a prosecution continuance request was not appealable under 18 U.S.C. 3731 even though "the orders appealed from *will certainly hamper (and may effectively prevent) the obtaining and subsequent use* of [an absent witness's] testimony" because

"those orders did not, either in substance or in form, limit the pool of potential evidence that would be *admissible* at the forthcoming trial." *Id.* at 40a (quoting *Watson*, 386 U.S. at 313 (emphasis added by Judge Ryan)). Thus, "[f]or the First Circuit, admissibility, rather than availability, is the critical factor in determining when the government may appeal an order under § 3731." *Id.* at 41a. She added that the "majority's decision is also contrary to the approach favored by the other federal courts of appeals, which reject the argument that any trial court order or ruling that hampers or effectively prevents the obtaining or use of evidence is appealable by the government under § 3731." *Id.* (citing *United States v. Hickey*, 185 F.3d 1064, 1066-67 (9th Cir. 1999); *United States v. Camisa*, 969 F.2d 1428 (2d Cir. 1992)).

Judge Ryan also reasoned that the textual differences between the military and federal civilian criminal appeals statutes rendered inapplicable those cases interpreting 18 U.S.C. 3731 to allow appeals of orders quashing subpoenas. While "federal courts of appeals have at times permitted appeals under 18 U.S.C. § 3731 in cases involving the quashing of subpoenas in the context of grand jury investigations," those cases "relied on the precise language—'[t]he provisions of this section shall be liberally construed to effectuate its purposes'—in § 3731 that is not present in Article 62, UCMJ." *Id.* at 42a (citing *In re Grand Jury Subpoenas (Kiefaber)*, 774 F.2d 969, 972-73 (9th Cir. 1985), *vacated on other grounds*, 823 F.2d 383 (9th Cir. 1987); *In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 856 (3d Cir. 1979)).

REASONS FOR GRANTING THE PETITION

By a 3-2 vote, the CAAF held that a statute authorizing the prosecution to file an interlocutory appeal challenging a trial-level ruling "which excludes evidence" provides the Article I military appellate courts with jurisdiction over a prosecution appeal of an order quashing a subpoena. That

decision contravenes the principle that statutes granting jurisdiction to Article I courts are to be narrowly construed. It is the latest in a line of decisions including the CAAF's decision in *Denedo v. United States*, 66 M.J. 114 (C.A.A.F. 2008), which this Court is now reviewing—in which it has interpreted its jurisdiction overly expansively.

As Article I courts, the military justice system's appellate courts are strictly limited to the authority Congress gave them. Congress gave the Courts of Criminal Appeals jurisdiction over prosecution appeals of certain orders that exclude evidence. Article 62(a)(1)(B), UCMJ, 10 U.S.C. 862(a)(1)(B) (2000). Here, the CAAF found jurisdiction to review not a ruling that actually excluded evidence, but rather a ruling that the CAAF found had the practical effect of excluding evidence. That interpretation, however, reaches beyond the plain language of Article 62 and seeks to expand the CAAF's jurisdiction by implication. The CAAF's approach is inconsistent with two separate doctrines that require Article 62's terms to be strictly construed, since Article 62 is both a statute granting jurisdiction to Article I courts and a statute authorizing prosecution appeals. The CAAF erred by nevertheless expansively interpreting Article 62 to allow the prosecution to appeal a discovery order.

The decision below warrants this Court's review for reasons similar to those that supported a grant of review in *United States v. Denedo*, No. 08-267: its reasoning departs from both this Court's case law and Congress's enactment on a fundamental question of jurisdiction. Certiorari is therefore appropriate. Alternatively, it would be appropriate for the Court to hold this petition pending its decision in *Denedo* and then grant the petition, vacate the lower court's opinion, and remand the case for further proceedings in light of that opinion.

A. A ruling quashing a subpoena does not fall within Congress's limited authorization for prosecution appeals in the military justice system.

1. The best indication of Congress's intent is the language of the statutes that it adopts. *United States v. Monsanto*, 491 U.S. 600, 610 (1989). Article 62's plain language indicates that it does not reach an order quashing a subpoena. The CAAF's own precedent had adopted a plain language construction of Article 62(a)(1)(B) that would have excluded an order quashing a subpoena from its scope: "Most lawyers think of exclusion of evidence as a ruling made at or before trial that certain testimony, documentary evidence, or real evidence is inadmissible. In short, 'excludes' usually is a term of art; and we see no reason to believe that Congress had any different intention in drafting" what is now Article 62(a)(1)(B). *United States v. Browers*, 20 M.J. 356, 360 (C.M.A. 1985).

A ruling quashing a subpoena does not fall within that plain language interpretation of Article 62(a)(1)(B) unless it holds that the evidence sought is inadmissible. The military judge's ruling in this case contained no such holding. On the contrary, as Judge Ryan's dissent below emphasized, in making the ruling that was the subject of the prosecution's appeal, the military judge observed that the requested outtakes "could be admissible into the evidence as statements of the accused under Military Rule of Evidence 801(d)." App., *infra*, 46a. Even were the subpoena to be quashed, the United States may be able to obtain the outtakes it seeks by other means. *See id.* at 47a. If so, the prosecution may be permitted to introduce the outtakes into evidence because the military judge has not ruled that they are inadmissible.

Article 62's plain language indicates that the narrow opening that Congress created for interlocutory prosecution appeals does not extend to rulings quashing subpoenas on grounds that do not hold that the evidence subpoenaed

would be inadmissible. The CAAF erred by failing to give effect to Article 62's plain language.

2. Canons of statutory construction indicating that Article 62 should be strictly construed reinforce the conclusion that the statute does not authorize interlocutory prosecution appeals of discovery orders, such as an order quashing a subpoena.

Article 62 grants Article I courts jurisdiction to hear prosecution appeals. As such, two separate principles demand that Article 62 be strictly limited to its plain language. First, statutes granting jurisdiction to Article I courts are strictly construed. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 908-09 n.46 (1988); *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam). This principle applies no less to military appellate courts' jurisdiction-granting statutes than to those of other Article I courts. *See, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999); *Loving v. United States*, 62 M.J. 235, 244 n.60 (C.A.A.F. 2005). Second, as Judge Ryan noted in her dissent below, "In criminal cases, prosecution appeals are not favored and are available only upon specific statutory authorization. *See United States v. Wilson*, 420 U.S. 332, 336 (1975); 7 Wayne R. LaFave et al., *Criminal Procedure* §27.3(a)-(b) (3d. ed. 2007)." App., *infra*, 37a. A strict construction of the phrase "[a]n order or ruling which excludes evidence" does not include discovery orders, such as an order quashing a subpoena, within its scope.

The CAAF's conclusion that Article 62 provides jurisdiction to review rulings, like the order quashing the subpoena, that do not actually exclude evidence but purportedly have the effect of doing so is an attempt to find jurisdiction by implication. But "jurisdiction of courts is neither granted nor assumed by implication." 3A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 67.3 (6th ed. 2000).

A comparison of Article 62 to the federal civilian Criminal Appeals Act, 18 U.S.C. 3731, further supports a narrow construction of Article 62. In the Criminal Appeals

Act, Congress specified that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." 18 U.S.C. 3731. Article 62 contains no similar liberal construction admonition. This difference in the statutes' plain language suggests that Congress did not intend the Criminal Appeals Act's liberal construction mandate to apply to Article 62. Rather, Article 62 is to be limited to its plain terms.

Article 62's legislative history bolsters the conclusion that Congress deliberately chose not to apply the liberal construction admonition to its authorization of military prosecution appeals. What is now Article 62 began its path to enactment as Senate Bill 974 of the 98th Congress. *See* S. Rep. No. 98-53 (1983); H.R. Rep. No. 98-549 (1983). The section-by-section analysis of the Senate Armed Services Committee's report on Senate Bill 974 explains that "[t]o the extent practicable," Article 62 "parallels 18 U.S.C. § 3731." S. Rep. No. 98-53 at 23. Given that 18 U.S.C. 3731 provided the model for Article 62 but the latter does not include the former's liberal construction language, there can be no serious doubt that Article 62's drafters deliberately chose to omit such a rule of construction from the military prosecution appeals statute.

The Senate Armed Services Committee's observation that Article 62 parallels 18 U.S.C. 3731 "[t]o the extent practicable," S. Rep. No. 98-53 at 23, further supports the conclusion that Congress did not intend courts to liberally construe Article 62. The committee report's language highlights Article 62's drafters' choice to depart from 18 U.S.C. 3731 in some respects. The omission of any liberal construction language is such a departure. The report suggests that such language's omission from Article 62 reflects its drafters' conclusion that such a mandate is impracticable for the military justice system. And it is easy to understand why the statute's drafters would have reached that conclusion. The Committee observed that the Military Justice Act of 1983's UCMJ amendments, which included the interlocutory prosecution appeal provision,

would "maintain the essential balance between the need for an effective and efficient system of military discipline on the one hand and the important goal of preserving the fundamental rights of a defendant in any system of criminal justice on the other." S. Rep. No. 98-53 at 4. Interlocutory appeals, however, directly interfere with the military justice system's ability to proceed promptly and efficiently. As the Rules for Courts-Martial's drafters observed, "Frequent appeals by the Government would disrupt trial dockets and could interfere with military operations and other activities, and would impose a heavy burden on appellate courts and counsel." Rule for Courts-Martial 908 drafters' analysis, *Manual for Courts-Martial, United States*, at A21-58 (2008 ed.). Omitting 18 U.S.C. 3731's liberal construction admonition, and thereby constricting the kinds and number of rulings that are subject to prosecution appeal, was a reasonable means for Congress to diminish the risk of too "[f]requent appeals by the Government."

B. The Question Presented is important and warrants this Court's review

1. Just like the pending *Denedo* case, "This case concerns a matter of fundamental importance with respect to the authority of the military courts created by Congress." Petition for Certiorari, *United States v. Denedo*, No. 08-267, at 21. The CAAF's ruling below threatens to undermine both the military justice system's efficiency and the rights of presumptively innocent service members, like Petitioner.

Before the ruling below, the military justice system adhered to a narrow reading of the portion of Article 62 involved in this case, limiting the phrase "excludes evidence" to rulings "made at or before trial that certain testimony, documentary evidence, or real evidence is inadmissible." *Browers*, 20 M.J. at 259. But the opinion below vastly expanded the kind and number of rulings that

can now be appealed by the prosecution. As Judge Ryan observed in her dissent below:

> If one accepts that any order or ruling that limits the pool of evidence that is available to the government is appealable under Article 62(a)(2)(B), then any ruling by a military judge that impacts the availability, as opposed to the admissibility, of evidence would be a proper subject of a government appeal. Under the majority's new rule there is no principled way to distinguish among: garden-variety scheduling orders, such as those at issue in *Browers*, which hindered the government's ability to offer a witness's testimony; discovery rulings of any sort that go against the government; and actual rulings on the admissibility of evidence.

App., *infra*, 43a. Allowing the prosecution to appeal such a wide array of rulings creates precisely the threat to the military justice system's efficient operation that the Rules for Courts-Martial's drafters cautioned against. *See* Rule for Courts-Martial 908 drafters' analysis, *Manual for Courts-Martial, United States*, at A21-58 (2008 ed.).

Expansively interpreting the prosecution's right to file interlocutory appeals also threatens presumptively innocent service members' speedy trial rights, including their congressionally prescribed rights under Article 10 of the UCMJ, 10 U.S.C. 810, and their presidentially prescribed rights under Rule for Courts-Martial 707. This adverse effect is particularly great because the filing of a notice of prosecution appeal automatically stays court-martial proceedings. Rule for Courts-Martial 908(b)(4), *Manual for Courts-Martial, United States* (2008 ed.). Such stays can have devastating consequences on service members charged with UCMJ violations, such as prolonging their military enlistments and lengthening pretrial restraint. Once a prosecution appeal is complete, the rule-based 120-day speedy trial clock resets at zero,

further exacerbating prosecution appeals' adverse effects. *See* R.C.M. 707(b)(3)(C). When Article 62 is strictly construed, these effects are minimized. On the other hand, a judicial opinion expansively interpreting Article 62, like that below, upsets the balance that Congress and the President struck between the prosecution's right to appeal a small class of particularly significant rulings and the rights of presumptively innocent service members facing trial by court-martial.

2. Granting review is also appropriate to curtail the CAAF's practice of expanding its authority beyond the limits of its jurisdiction-granting statutes. In *Denedo*, the United States observed that the CAAF's opinion there "represents the latest iteration of that court's efforts to expand its role beyond its congressionally prescribed jurisdiction to 'review * * * specified sentences imposed by courts-martial.'" Petition for Certiorari, *United States v. Denedo*, No. 08-267, at 24 (quoting *Goldsmith*, 526 U.S. at 534). In its decision below, the CAAF yet again forayed beyond its jurisdictional boundaries. Just as the United States urged in *Denedo*, "This Court's intervention is warranted, once again, in order to confine the CAAF to its statutory jurisdiction." *Id.* at 25.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the petition should be held pending the Court's decision in *United States v. Denedo*, No. 08-267, and then the petition should be granted, the lower court's decision vacated, and the case remanded for further consideration in light of the Court's decision in *Denedo*.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee v. Frank D. WUTERICH, Staff Sergeant U.S. Marine Corps, Appellant AND CBS BROADCASTING INC., Petitioner v. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS, THE UNITED STATES OF AMERICA, and Frank D. WUTERICH, Staff Sergeant, U.S. Marine Corps, Respondents AND In re Frank D. WUTERICH

No. 08-6006, No. 08-8020/MC, No. 08-8021/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

67 M.J. 63; 2008 CAAF LEXIS 1208

September 17, 2008, Argued
November 17, 2008, Decided

EFFRON, C.J., delivered the opinion of the Court, in which BAKER and STUCKY, JJ., joined. RYAN, J., filed a separate dissenting opinion, in which ERDMANN, J., joined.

Military Judge: Jeffrey G. Meeks

Chief Judge EFFRON delivered the opinion of the Court.

The present case concerns three filings arising out of *United States v. Wuterich*, a pending court-martial

convened at Camp Pendleton, California. *United States v. Wuterich*, No. 08-6006, is a petition for grant of review under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3) (2000), filed by Staff Sergeant (SSgt) Frank D. Wuterich (Appellant), the accused in the pending court-martial. *In re Wuterich*, No. 08-8021, is a petition for extraordinary relief filed by SSgt Wuterich under the All Writs Act, 28 U.S.C. § 1651(a) (2000). CBS *Broadcasting Inc. v. United States*, No. 08-0820, is a petition for extraordinary relief filed by CBS Broadcasting Inc., the recipient of a subpoena in the pending court-martial. On September 17, 2008, we held a consolidated hearing on these three filings.

The consolidated cases involve a ruling by the military judge in the pending court-martial. *See infra* Part I. Appellant faces charges of voluntary manslaughter and other offenses related to the deaths of civilians in Haditha, Iraq. During the period in which the civilian deaths were under investigation, Appellant provided an interview to CBS Broadcasting Inc. regarding the events on the date of and in the place of the charged offenses. CBS subsequently broadcast a portion of the interview as part of the *60 Minutes* television program. The Government issued a subpoena to CBS that included a request for the outtakes -- the portions of the interview given by Appellant that were not included in the broadcast. CBS declined to provide the outtakes and filed a motion to quash the subpoena. The military judge, without reviewing the content of the outtakes, granted the motion to quash the subpoena. The Government appealed under Article 62, UCMJ, 10 U.S.C. § 862 (2000), which provides authority for interlocutory government appeals similar to the authority available in federal civilian criminal prosecutions under 18 U.S.C. § 3731 (2000).

The present appeal primarily involves two issues. First, whether the military judge's ruling is subject to appeal under Article 62. Second, whether the military judge erred by granting the motion to quash the subpoena

without first conducting an in camera review of the contents of the requested material.

This Court consistently has looked to the decisions of the federal courts under section 3731 for guidance in interpreting the parallel provisions of Article 62. *See infra* Part III.B.1. Under those decisions, which provide important guidance limiting such review, a ruling that quashes a subpoena is subject to interlocutory appellate review. *See infra* Part III.B.2. Likewise, those decisions provide guidance as to the circumstances in which it is appropriate for the trial court to conduct an in camera review. *See infra* Part III.D. For the reasons set forth below, we conclude that the ruling of the military judge was subject to appeal under Article 62. We further conclude that it was an abuse of discretion for the military judge to quash the subpoena without first conducting an in camera review of the requested materials. In our decretal paragraph, we order the military judge to review the requested material prior to ruling on the motion to quash the subpoena.

Part I summarizes the circumstances leading up to the current appeal. Part II describes the issues set forth in each of the filings. Part III discusses the procedural and substantive issues raised by the filings. Part IV sets forth our decision.

I. BACKGROUND

A. THE CHARGES AT THE PENDING COURT-MARTIAL

The trial of SSgt Wuterich concerns the alleged unlawful killing of civilians during military operations in Haditha, Iraq, on November 19, 2005. During an investigation into the events in Haditha, Appellant provided a statement on February 21, 2006, concerning this incident and his role.

Following further investigation, charges against Appellant were referred for trial by court-martial on December 27, 2007. The pending charges allege dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice, offenses under Articles 92, 119, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 919, 928, 934 (2000).

B. STATEMENTS PROVIDED BY APPELLANT TO CBS REGARDING THE CHARGED OFFENSES

On March 18, 2007, the CBS television program *60 Minutes* broadcast a segment entitled "The Killings in Haditha; Staff Sergeant Frank Wuterich discusses what the Marines did the day 24 Iraqi civilians were killed." At the outset of the broadcast, the CBS correspondent offered the following introduction:

> On November 19th, 2005, a squad of United States Marines killed 24 apparently innocent civilians in an Iraqi town called Haditha. The dead included men, women and children as young as two. Iraqi witnesses say the Marines were on a rampage, slaughtering people in the street and in their homes. And in December, four Marines were charged with murder. Was it murder? Was Haditha a massacre? A military jury will decide, but there's no question that Haditha is symbolic of a war that leaves American troops with terrible choices. The Marine making those choices in Haditha was a 25-year-old sergeant named Frank Wuterich. He's charged with 18 murders, the most by far, and he's accused of lying on the day that it happened. Wuterich faces life in prison. None of the Marines charged with murder has spoken publicly

> about this, but tonight Staff Sergeant Wuterich says he wants to tell the truth about the day he decided who would live and who would die in Haditha.

The segment included questions to Appellant by CBS correspondent Scott Pelley, statements by Appellant, observations by Mr. Pelley regarding Appellant's statements, other commentary by Mr. Pelley, and statements by other individuals. The segment consisted of about one-half hour of broadcast time.

The statements broadcast by CBS were made during an on-camera interview with Appellant conducted by Mr. Pelley in October 2006. According to Mr. Pelley, "During our interview, Staff Sergeant Wuterich recounted the events of the incident at Haditha." The precise length of Appellant's interview with CBS is not set forth in the record. Defense counsel indicated on the record that the interview lasted for "hours," and the military judge referred to representations that there were "several hours" of outtakes. These statements have not been challenged on appeal. Subsequent to Appellant's meeting with Mr. Pelley, CBS selected portions of the interview for presentation during the broadcast.

C. THE SUBPOENA FOR APPELLANT'S STATEMENTS TO CBS

The prosecution issued a subpoena to CBS, dated January 16, 2008. *See* Rule for Courts-Martial (R.C.M.) 703. In pertinent part, the subpoena required CBS "to deliver any and all video and/or audio tape(s), to include out-takes and raw footage, of any and all interviews and/or statements, oral comments, and/or oral communications or nonverbal acts, actions, and/or acknowledgements made by Staff Sergeant Frank D. Wuterich, United States Marine Corps, recorded by or for, or in the possession of, CBS News." The subpoena also noted that "SSgt Frank D.

Wuterich is a criminal defendant and any/all statements made by him or his defense counsel concerning his actions could be deemed to be admissions and admissible at the trial of the facts . . . ."

CBS moved to quash the portion of the subpoena that sought production of the unaired footage. In support of the motion, CBS cited R.C.M. 703(f)(4)(C), which authorizes the military judge to require that a subpoena be withdrawn or modified if it is "unreasonable or oppressive." CBS also contended that the subpoena should be quashed because the Government could not meet its burden of showing that production of the unaired footage was required under "a qualified reporter's privilege that is rooted in both the First Amendment . . . and the common law." As an alternative to the motion to quash the subpoena, CBS moved that the military judge issue "a protective order, pursuant to R.C.M. 701(g)(2), precluding the Government from obtaining the materials sought by the subpoena." CBS agreed to provide and authenticate a copy of the segment broadcast on *60 Minutes*.

Responding to the CBS motion, the prosecution asserted that the subpoena reflected a good faith determination that the outtakes contained admissions from Appellant that were relevant, material, and necessary. The prosecution contended that the existence of a reporter's privilege represented a minority view among the federal courts and that, even under the rulings of those courts that had found a qualified privilege, the subpoena should not be quashed.

The prosecution and CBS submitted detailed briefs to the military judge, including appendices directed to the question of whether the information sought in the outtakes was cumulative of evidence otherwise in the Government's possession. The military judge reviewed the *60 Minutes* broadcast, but he did not obtain and review the unaired outtakes that were the subject of the motion to quash.

The defense did not submit a brief on the CBS motion to quash. When the military judge asked whether

the defense had a position on the motion to quash, defense counsel responded: "No, Your Honor."

During a subsequent colloquy with trial counsel, the military judge commented to trial counsel that after viewing the *60 Minutes* broadcast, "I'm having a hard time seeing what it is you think that's there that's not already there." Trial counsel responded that the outtakes could provide the prosecution with the following information about Appellant's broadcast statements:

> The background to those comments. The backdrop for his rational[e]. The in-context expressions of the accused in the context of the interview. Not the snippets. Not the sound bites. Not the portion that has been edited for broadcast. But the context. The totality of his expressions of his conduct, and his rational[e] for his conduct and the conduct on the part of his Marines.

The military judge then asked defense counsel what position the defense would take at trial if the prosecution offered into evidence Appellant's statements from the *60 Minutes* broadcast. Defense counsel responded that he would object if the prosecution sought to admit only the broadcast portions of the interview: "I would assert the doctrine of completeness [under] M.R.E. 106 and ask that it all be there for context." At that point, the military judge asked counsel for CBS what position CBS would take if the defense asked for the complete interview. Counsel for CBS responded that "we would, I suspect, file a similar motion to quash," depending on the state of the record at the time, among other factors. He further noted that the burden to overcome the privilege asserted by CBS would rest with the defense, although the balance might be different in the context of a defense request.

Defense counsel requested permission to address the issue, noting that the defense was not "requesting that

these outtakes be admitted [at] trial." Defense counsel further emphasized that "we are not a party to the dispute that's going on today. And we are also not required to assist the government in acquiring its evidence or the evidence it thinks it needs. That's never our duty . . . ."

The military judge did not indicate how he might rule if the defense were to offer a motion to compel introduction of the interview outtakes under Military Rule of Evidence (M.R.E.) 106. Instead, he indicated that he would provide both the prosecution and counsel for CBS with the opportunity to brief that issue should it arise in the future.

At the conclusion of arguments on the motion, the military judge granted the motion to quash the subpoena on the grounds that "the requirement of necessity has not been met." *See* R.C.M. 703(f)(1) ("Each party is entitled to the production of evidence which is relevant and necessary."). The military judge took note of "the representation that there are several hours of outtakes in the possession of CBS which contain information concerning the accused's view of the events that occurred on the 19th of November of 2005." He also observed that the outtakes "could be admissible into the evidence as statements of the accused under Military Rule of Evidence 801(d) [admissibility of statements by a party-opponent]." The military judge concluded, however, that "with respect to the outtakes, the contents of the accused's comments are speculative at this point and the court is concerned that the subpoena in this case likely qualifies as a fishing expedition."

The military judge determined that production of the requested information was not necessary because "the information desired here by the government from CBS would be cumulative with what is already in the hands of the government." *See* R.C.M. 703(f)(1) Discussion (noting, in the nonbinding commentary accompanying the rule, that "[r]elevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of

the case in some positive way on a matter in issue"). In the course of reaching his conclusion on cumulativeness, the military judge considered the availability to the prosecution of statements by Appellant broadcast in the *60 Minutes* segment; other statements made by Appellant prior to trial; statements made by members of his unit; and the forensic evidence, photographs, and other physical evidence obtained from the scene of the charged offenses.

The military judge also addressed the question of whether CBS could rely on a newsgathering privilege, stating that he was persuaded that such a privilege existed "under federal common law." He added, however, that it was not necessary to base his decision on such a privilege because any motion to quash that met the "lower standard" of R.C.M. 703 would necessarily meet "the greater standard required for disclosure" under a qualified reporter's privilege.

The prosecution asked the military judge to reconsider his ruling "and order an in camera inspection to determine whether or not the material in question is in fact cumulative . . . given the fact that the military judge had not had an opportunity to review" the material. *See* R.C.M. 703(f)(4)(C) (providing that when the recipient of a subpoena requests relief, "the military judge may direct that the evidence be submitted to the military judge for an in camera inspection to determine whether such relief should be granted"). The military judge denied the motion without explanation. The Government appealed the ruling to the Court of Criminal Appeals under Article 62, UCMJ, 10 U.S.C. § 862 (2000). The United States Navy-Marine Corps Court of Criminal Appeals vacated the ruling of the military judge and remanded the case for further proceedings. *United States v. Wuterich*, 66 M.J. 685, 691-92 (N-M. Ct. Crim. App. 2008).

II. THE PENDING PROCEEDINGS

The present consolidated case addresses three pending filings that seek review of the decision by the Court of Criminal Appeals. In *United States v. Wuterich*, No. 08-6006, Appellant has filed a petition for grant of review under Article 67(a)(3), UCMJ. On Appellant's petition, we have granted review of the following issues:

> I. Whether the lower court erred in holding that it has jurisdiction to entertain the Government's challenge of a discovery ruling pursuant to Article 62, UCMJ.
>
> II. Whether the lower court erred in holding that the Appellant did not have standing as petitioner/appellee and thereby violated Appellant's statutory and constitutional right to counsel.

In a related case, *In re Wuterich*, No. 08-8021, Appellant filed a petition for extraordinary relief under 28 U.S.C. § 1651(a), as an alternative, in the event that we determined Appellant lacks standing to appeal under Article 67(a)(3), UCMJ. In view of our determination, *infra* Part III.A., that Appellant has standing to appeal under Article 67(a)(3), UCMJ, we deny the writ petition as moot.

The third filing, *CBS Broadcasting Inc. v. United States*, No. 08-0820, is a petition for extraordinary relief to obtain review of the decision by the Court of Criminal Appeals. CBS filed this writ as an alternative to reliance on Appellant's petition for grant of review under Article 67(a)(3), UCMJ, as the vehicle for reviewing the decision of the court below. In the writ petition, CBS suggested that the merits of the decision by the lower court could be addressed properly during consideration of Appellant's petition for review under Article 67(a)(3), UCMJ. We agree, and deny the CBS writ petition as moot.

The Government appeal under Article 62 automatically stayed the proceedings before the court-martial pending disposition by the Court of Criminal Appeals. *See* R.C.M. 908(b)(4). The Court of Criminal Appeals subsequently returned the case for further proceedings before the court-martial. 66 M.J. at 691-92. Our Court has not ordered a stay of the pending court-martial proceedings. *See* R.C.M. 908(c)(3). Neither party has asked us to issue a stay or otherwise take action with respect to the status of the court-martial.

III. DISCUSSION

In the present case, Appellant—knowing of the investigation into the events in Haditha—granted an interview to CBS Broadcasting Inc. CBS, which was aware of the ongoing investigation, focused the interview on the events occurring on the date and in the place of the matters under investigation. CBS broadcast some, but not all, of the statements made by Appellant during the interview. In the nationally televised *60 Minutes* program, CBS stated that Appellant wanted "to tell the truth about the day he decided who would live and who would die in Haditha."

At this stage in the appellate proceedings, Appellant neither contests the voluntariness of the statements made during his CBS interview about the events in Haditha nor claims any privilege that would preclude use of his statements to CBS in the pending court-martial. The majority of the statements made by Appellant during the CBS interview, however, are not now available for introduction into evidence at the court-martial. In response to a Government subpoena for tapes of Appellant's entire interview, CBS produced only the broadcast portion. It declined to provide the court-martial with the outtakes, which contained the majority of Appellant's interview statements.

On the record before us, only CBS has access to Appellant's full interview regarding the events in Haditha.

Only CBS—an entity that is not a party to the pending court-martial—is in a position to assess whether the statements in the outtakes are exculpatory, inculpatory, or otherwise necessary to enhance the significance of other statements made by Appellant.

The military judge ruled that the Government could not have access to the majority of statements made by the accused in his interview because the military judge concluded that those statements—which he had not reviewed—were cumulative in relationship to other evidence available to the Government. The military judge did not explain on the record how he was able to assess the content and quality of statements contained in the outtakes that he had not reviewed.

Appellant and Petitioner-CBS each contend that the military judge's ruling was not appealable under Article 62, UCMJ, the statute governing prosecution appeals. Further, each contends that the ruling by the military judge, even if subject to appeal, did not constitute an abuse of discretion. In addition, Appellant contends that the lower court erred in ruling that he did not have standing to participate in the appellate proceedings. Section A of this discussion addresses standing. Section B discusses government appeals in criminal cases. Section C considers the Government appeal in the present case. Section D discusses the military judge's decision that production of the outtakes was not necessary because the evidence therein was cumulative. Section E addresses further proceedings.

A. STANDING

After the military judge quashed the Government's subpoena, the Government filed an appeal under Article 62, UCMJ. Appellant filed a motion to dismiss on the grounds that the military judge's ruling was not appealable under Article 62, UMCJ.

The Court of Criminal Appeals declined to consider Appellant's filings on the grounds that Appellant had no standing to participate in the Government's appeal under Article 62, UCMJ. *Wuterich*, 66 M.J. at 688-89. The Court of Criminal Appeals noted that defense counsel had asserted at trial that SSgt Wuterich was not a party to the dispute between CBS and the Government. *Id. at 688.* The court primarily relied on cases involving the concept of standing under the Fourth Amendment, as well as cases involving privileges and third-party subpoenas. See *id.* at 688-89.

The jurisdictional concept of standing normally concerns the limitation of the judicial power of the United States to "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. *See, e.g., Sprint Communc'ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2535 (2008) (summarizing the requirements for a plaintiff in civil litigation to establish standing—an injury in fact, causation, and redressability). This Court, which was established under Article I of the Constitution, has applied the principles from the "cases" and "controversies" limitation as a prudential matter. *See United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).

The evidentiary concept of standing in criminal cases concerns the issue of whether a defendant has a sufficient interest in the object of a search, a claim of privilege, or other evidentiary matter to prevail on the merits of the objection. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 134-40 (1978); *United States v. Johnson*, 53 M.J. 459, 461-62 (C.A.A.F. 2000); *United States v. Jones*, 52 M.J. 60, 63-64 (C.A.A.F. 1999). These cases involve the criteria used to assess the merits of a criminal defendant's evidentiary claims, not the right of a defendant to participate as a litigant in the assessment of those claims.

Appellant did not initiate the present litigation. He is a defendant in a criminal case brought by the United States. Trial defense counsel's comment regarding the dispute between the Government and CBS was offered in

the context of counsel's position that the defense had no obligation to assist the Government in obtaining the evidence from CBS. Defense counsel expressly addressed the interest of Appellant in the requested material under the rule of completeness of M.R.E. 106. *See supra* Part I.C. The position articulated by trial defense counsel before the military judge underscores the direct interest of Appellant in the scope of any ruling at trial or on appeal regarding the evidence that would be available for consideration at this trial.

Appellant sought to persuade the Court of Criminal Appeals that the military judge's order was not subject to appeal under Article 62, and that the case should proceed with a trial on the merits. In so doing, Appellant invoked his direct interest in prompt disposition of the charges, a matter expressly addressed in Article 62, UCMJ. Although it would have been appropriate for the Court of Criminal Appeals to consider the relationship of Appellant to the requested material for purposes of assessing how much weight, if any, to accord Appellant's views on the motion to quash the subpoena, it was not appropriate to deprive him altogether of the opportunity to participate in appellate litigation having direct consequences on the prompt disposition of criminal proceedings brought against him by the United States.

As a result of the lower court's erroneous view of standing, Appellant did not have the opportunity to participate in the appellate proceedings before that court. Under these circumstances, we vacate the decision of the court below in our decretal paragraph. In view of the pending court-martial proceedings, and because this case involves an issue of law that does not pertain to the unique factfinding powers of the Court of Criminal Appeals, we shall review directly the decision of the military judge without remanding the case to the lower court. *See United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006) ("When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, we typically have pierced through

that intermediate level and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling.") (citations and quotation marks omitted).

B. GOVERNMENT APPEALS IN CRIMINAL CASES

Federal courts, including courts in the military justice system established under Article I of the Constitution, are courts of limited jurisdiction. *See United States v. Lopez de Victoria*, 66 M.J. 67, 69 (C.A.A.F. 2008) (noting that such jurisdiction "is conferred ultimately by the Constitution, and immediately by statute"). In criminal cases, prosecution appeals are not favored and are available only upon specific statutory authorization. *See* 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.3(a)-(b) (3d. ed. 2007); *United States v. Watson*, 386 F.3d 304, 307 (1st Cir. 2004). The constitutional prohibition on double jeopardy and related statutory considerations severely limit post-trial appeals by the prosecution in contrast to the broad appellate rights of the defense following the conclusion of trial. *See* 7 LaFave, *supra*, § 27.3(a). In view of these limitations, the prosecution as a general matter has a somewhat broader opportunity than the defense to file appeals during the trial. *See id.* § 27.3(c). Congress has authorized interlocutory government appeals in federal civilian criminal cases under 18 U.S.C. § 3731 (2000).[1]

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[1] The current version of 18 U.S.C. § 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Congress also has authorized interlocutory prosecution appeals in cases tried by courts-martial under Article 62, UCMJ, 10 U.S.C. § 862.[2]

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

[2] The current version of Article 62, UCMJ, provides:

> (a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):
>
> (A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.
>
> (B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.
>
> (C) An order or ruling which directs the disclosure of classified information.

1. *The relationship between Article 62, UCMJ, and 18 U.S.C. § 3731*

Congress provided authority for interlocutory government appeals under Article 62, UCMJ, in the Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393 (1983). Congress based the legislation on 18

(D) An order or ruling which imposes sanctions for nondisclosure of classified information.

(E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.

(F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Criminal Appeals and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law, notwithstanding section 866(c) of this title [10 U.S.C. § 866(c)] (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

U.S.C. § 3731, the statute applicable to the trial of criminal cases in the federal district courts. *See* S. Rep. No. 98-53, at 6 (1983) (stating that Article 62 "allows appeal by the government under procedures similar to an appeal by the United States in a federal civilian prosecution"); *id.* at 23 (stating that "[t]o the extent practicable, the proposal parallels 18 U.S.C. § 3731, which permits appeals by the United States in federal prosecutions").

As Chief Judge Everett noted in *United States v. Browers*:

> Because the legislative history makes clear that Congress intended for Article 62 appeals to be conducted "under procedures similar to [those governing] an appeal by the United States in a federal civilian prosecution," we look to federal precedent for guidance on this question.

20 M.J. 356, 359 (C.M.A. 1985) (alteration in original) (quoting S. Rep. No. 98-53, at 6); *accord Lopez de Victoria*, 66 M.J. at 70-71; *United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995); *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995); United *States v. True*, 28 M.J. 1, 3 (C.M.A. 1989).

Federal court decisions interpreting 18 U.S.C. § 3731 constitute guidance, not binding precedent, in the interpretation of Article 62, UCMJ. When considering the import of cases arising under 18 U.S.C. § 3731, we bear in mind that "Congress, in enacting the revised Article 62, UCMJ, in 1983, clearly intended to afford the government a right to appeal which, 'to the extent practicable . . . parallels 18 U.S.C. § 3731 . . . .'" *Lopez de Victoria*, 66 M.J. at 70 (first ellipsis in original) (quoting S. Rep. No. 98-53, at 23). In that regard, we take into account the structural differences between courts-martial and trials in federal district court, as well as the textual similarities and

differences with respect to Article 62, UCMJ, and 18 U.S.C. § 3731.

Section 3731, for example, states: "The provisions of this section shall be liberally construed to effectuate its purposes." The First Circuit, in *United States v. Watson*, described the legislative background of this provision. The court noted that the initial statute authorizing government appeals in federal criminal cases referred only to "motion[s] to suppress." 386 F.3d at 308-10. Following a series of judicial decisions narrowly construing this provision, Congress expanded the statute to cover all orders suppressing or excluding evidence and added the language on liberal construction to "'reverse[] the practice of narrowly interpreting'" the statute. *See id.* at 309 (quoting S. Rep. No. 91-1296, at 37 (1970), and citing Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14, 84 Stat. 1880, 1890 (1971)). With respect to the guidance drawn from cases interpreting 18 U.S.C. § 3731, we note that those cases routinely cite the liberal construction admonition in the course of addressing the scope of section 3731. *E.g.*, *Watson*, 386 F.3d at 310; *In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 855-56 (3d Cir. 1979).

Article 62, UCMJ, on the other hand, contains no language on statutory construction, and its legislative history does not demonstrate a rationale for the omission of this language.

Therefore, it would be inappropriate to apply the liberal construction mandate of section 3731 when interpreting Article 62, UCMJ. This is consistent with our past practice. We have not previously applied an explicit liberal construction when interpreting Article 62, UCMJ. We treat cases interpreting parallel provisions of 18 U.S.C. § 3731 as guidance, not as mandates; and we apply that guidance only to the extent consistent with an interpretation of Article 62 that is not dependent upon the liberal construction admonition.

2. Appeals under 18 U.S.C. § 3731

The issues in the present appeal concern the meaning of the term "excludes evidence" in *Article 62.* The statute permits the government to appeal an "order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Article 62(a)(1)(B), UCMJ. Under this provision, trial counsel must file a certification with the military judge "that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding." Article 62(a)(2), UCMJ. The related provision governing federal civilian criminal trials, 18 U.S.C. § 3731, permits the government to appeal an order by the trial court "suppressing or excluding evidence." The United States Attorney must certify "that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." *Id.*

The courts of appeals have addressed the meaning of the term "excluding evidence" under 18 U.S.C. § 3731 and have concluded that the term includes an order quashing a subpoena. *See* 25 James Wm. Moore et al., *Moore's Federal Practice* ¶ 617.08[4] (3d. ed. 2008); 7 LaFave, *supra*, § 27.3(c). The case law in this area, permitting appeal of an order quashing a subpoena, predates the enactment of Article 62, UCMJ. *See, e.g., Colucci*, 597 F.2d at 856.

In *Watson*, the First Circuit discussed the scope of the term "excluding evidence" under 18 U.S.C. § 3731. 386 F.3d at 307. The appeal involved a trial court ruling that denied a government motion for a continuance. Prior to trial, the prosecution asked immigration officials to keep the prosecution informed of the status of a potential witness. The immigration officials neglected to do so, and deported the witness. The government moved for a continuance to conduct an overseas deposition. The trial court denied the motion, noting that the case was more than three years old, there were speedy trial issues, the

problem was a result of government negligence, and it could take six to twelve months to obtain the testimony by deposition. The government renewed its motion, and the trial court denied the renewed motion for the same reasons. *Id.* at 306-07.

The court of appeals concluded that the orders denying the motions were not appealable under 18 U.S.C. § 3731 because they were case-management orders, entered with the purpose of preventing delay:

> Although the orders appealed from will certainly hamper (and may effectively prevent) the obtaining and subsequent use of [the witness's] testimony, those orders did not, either in substance or in form, limit the pool of potential evidence that would be admissible at the forthcoming trial. Rather, they were premised on, and accomplished, a more prosaic goal: the lower court's determination to forestall further delay. That was why the court denied the requested continuance—and the practical effect of that denial was to clear the way for the trial to proceed. That the orders had an incidental effect on the government's evidence-gathering is too remote a consequence to support appellate jurisdiction under the second paragraph of section 3731.

Id. at 313.

In the course of its opinion, the court of appeals reviewed the development of 18 U.S.C. § 3731 as well as cases applying the provision to permit appeals of decisions "excluding evidence." The court concluded that an interlocutory prosecution appeal under section 3731 is permitted when "the order itself is the practical equivalent of a suppression or exclusion order; that is, when the order has the direct effect of denying the government the right to use evidence. If such an effect is only incidental, then there

can be no appeal." *Id.* at 311. The cases discussed in *Watson* in support of this test reflect a highly case-specific approach to the determination of whether the effect on the exclusion of evidence is direct or incidental. *See id.* at 310-12. *Watson* did not call into question any of the cases permitting government appeal of an order quashing a subpoena.

Under *Watson*, the pertinent inquiry is not whether the court has issued a ruling on admissibility, but instead whether the ruling at issue "in substance or in form" has limited "the pool of potential evidence that would be admissible." *Id. at* 313. The distinction drawn by *Watson* between direct and incidental effects underscores that the inquiry concerns the impact of the ruling on the pool of potential evidence, not whether there has been a formal ruling on admissibility. *See id.* at 311-12.

3. Limitations on appeals under Article 62, UCMJ

Appellant and Petitioner-CBS contend that the prosecution may not appeal an order quashing a subpoena under Article 62, UCMJ, irrespective of the authority for the prosecution to appeal such orders under 18 U.S.C. § 3731. According to Appellant, Chief Judge Everett's opinion in *Browers*, 20 M.J. at 356, "stands for the proposition that Article 62 authorizes prosecution appeals of orders excluding evidence only where a military judge rules that certain evidence 'is inadmissible.'"

Contrary to Appellant's assertion, Chief Judge Everett did not state that such an Article 62 appeal could take place "only" if the military judge rules that evidence "is inadmissible." *Browers*, like *Watson*, involved an appeal of a case-management ruling by the trial judge. The prosecution at trial moved for a continuance due to the absence of two witnesses. The military judge denied the motion, noting that the charges were old, one witness was not likely to be available in the near future, and the government had failed to keep track of the other witness.

In *Browers*, Chief Judge Everett concluded that the order was not appealable because it involved the question of trial scheduling, not the exclusion of evidence. 20 M.J. at 356-60.

In the course of discussing this issue, Chief Judge Everett stated:

> Most lawyers think of exclusion of evidence as a ruling made at or before trial that certain testimony, documentary evidence, or real evidence is inadmissible. In short, "excludes" usually is a term of art; and we see no reason to believe that Congress had any different intention in drafting Article 62(a)(1).

Id. at 360.

Chief Judge Everett referred generally to what "[m]ost lawyers think" and described "excludes" as a word that "usually is a term of art." *Id.* The nonexclusive nature of these observations underscores that the opinion did not provide either a formal definition or a comprehensive description of the meaning of "excludes." In context, Chief Judge Everett's observations set the stage for his conclusion on the critical issue in the case: denial of a continuance, in a case that had languished, involved a scheduling matter that did not amount to an exclusion of evidence. Highlighting the case-management nature of an order denying a continuance, he stated: "Indeed, we suspect Congress believed that the scheduling of trials should be left primarily to trial judges and reliance should be placed on their judgment." *Id. at 360.* His opinion did not establish a bright-line rule or a comprehensive definition of "excludes," nor did it otherwise hold that an order is appealable under Article 62(a)(1)(B) "only" if there is a formal ruling that evidence is inadmissible.

Appellant's argument suggests that the phrase "excludes evidence" means something different in military law than the term "excluding evidence" means in civilian

criminal proceedings. In that regard, we note that in *Browers*, Chief Judge Everett did not state that we should disregard decisions under 18 U.S.C. § 3731 permitting appeal even without a formal ruling on admissibility. On the contrary, as noted above in Part III.B.1., he expressly stated that we "look to federal precedent for guidance" in the interpretation of Article 62. 20 M.J. at 359. He specifically noted that the government had not identified any cases arising under 18 U.S.C. § 3731 in which denial of a continuance had been treated as an appealable order. *Id.* at 360.

In a subsequent dissent, Chief Judge Everett took the position that the Court in *Browers* "adopted a narrow construction of the statutory language." *United States v. True*, 28 M.J. 1, 5 (C.M.A. 1989) (Everett, C.J., dissenting). His view, however, was not joined by the other members of the Court. In that regard, we note that *Browers* was decided with the participation of only two Judges, Chief Judge Everett and Judge Cox. 20 M.J. at 360. Judge Cox—who concurred separately in *Browers*—did not endorse Chief Judge Everett's suggestion in *True* that the Court in *Browers* had adopted a "narrow construction" of Article 62. Instead, he joined the majority opinion in *True*. 28 M.J. at 4. The majority in *True* rejected a narrow construction of the statute, noting: "Prudent advice concerning the use of [Article 62] should not be confused with an unjustified narrowing of the scope of this statute or deliberate frustration of the will of Congress." 28 M.J. at 3.

In short, this Court's decision in *Browers* does not support the proposition that the term "excludes" in Article 62 refers only to a ruling that evidence is inadmissible. Likewise, *Browers* does not support the proposition that the term "excludes" under Article 62 should be construed more narrowly than the term "excluding" under section 3731. On the contrary, *Browers* expressly identified case law under section 3731 as an important source of guidance in interpreting Article 62. The text of Article 62 does not reflect that Congress used the word "exclude" as a term of

art limited to formal rulings on admissibility. *Cf.* Articles 43(d), 57(b), 120(s), UCMJ, 10 U.S.C. §§ 843(d), 857(b), 920(s) (2000) (using the terms "excluded" and "excluding" in various legal contexts to convey descriptive meanings different from the concept of admissibility). *Compare Watson,* 386 F.3d at 313 (describing a ruling "excluding evidence" under section 3731 as one "that would, either in substance or in form, limit the pool of potential evidence that would be admissible"). We agree with the approach taken in *Watson*, which focused on the pool of potential evidence, not a formal ruling on admissibility. *See supra* Part III.B.2.

The legislative history of Article 62, UCMJ, also does not reflect that Congress intended the word "exclude" to be a term of art limited to rulings on admissibility. Congress, in drafting Article 62, UCMJ, did not focus on the word "excludes" or "excluding." To the extent that the state of the law at the time of enactment illuminates congressional intent, we note that the *Colucci* case applying 18 U.S.C. § 3731 to an order quashing a subpoena predated enactment of Article 62, UCMJ, by several years. *See Colucci,* 597 F.2d at 855-56. We need not rely on that point, however, but instead focus on the meaning of the word "exclude" in the context of the similar wording in section 3731 ("excluding") and Article 62 ("excludes"). We also focus on the purpose of Article 62, UCMJ, reflected in its structure and legislative history, to provide the government in military cases with the same interlocutory appeal authority as in civilian criminal cases, "to the extent practicable." *See* S. Rep. No. 98-53, at 23 (1983); *cf.* Article 36, UCMJ, 10 U.S.C. § 836 (2000) (authorizing the President to prescribe pretrial, trial, and post-trial procedural and evidentiary rules that follow the rules for trials in federal district courts insofar as the President deems practicable).

We conclude that application of guidance from the federal court decisions under 18 U.S.C. § 3731 is both practicable and appropriate. Under that guidance, a ruling quashing a subpoena is appealable under Article 62,

UCMJ. We have specifically taken into account, and apply, the guidance from cases under 18 U.S.C. § 3731 restricting interlocutory government appeals to those rulings that have a direct rather than incidental effect on the exclusion of evidence. *See supra* Part III.B.2. In reaching this conclusion, we have considered the differences between courts-martial and civilian trials, particularly the emphasis in military law on prompt disposition of trials and appeals, and the accelerated time frames in Article 62. *Compare, e.g.*, Article 62(a)(2), UCMJ, *with* 18 U.S.C. § 3731. *See, e.g.*, *Manual for Courts-Martial, United States*, pt. I, para. 3 (2008 ed.); R.C.M. 908. Appellate courts in the military justice system are required to give priority to cases arising under Article 62 whenever practicable. *See* Article 62(b); C.A.A.F. R. 19(a)(7)(A). In the present case, we note that this Court has not issued a stay of the court-martial proceedings. *See* R.C.M. 908(c)(3). Neither party has asked us to issue a stay or otherwise take action with respect to the status of the court-martial. *See supra* Part II.

The experience in federal civilian courts underscores the infrequency of government appeals from orders quashing subpoenas and the effectiveness of judicial interpretations of 18 U.S.C. § 3731 in that regard. In a section 3731 appeal, as in an appeal under Article 62, the prosecution must certify that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceedings. Section 3731 has been interpreted to apply only to rulings that have a direct rather than an incidental effect of excluding evidence. *See, e.g.*, *Watson*, 386 F.3d at 311-13. The interpretation set forth in *Watson*, which we apply in the context of Article 62, provides a significant limitation on the availability of government appeals. We have no reason to anticipate that application of that interpretation in the military justice system should differ with respect to the relative infrequency of government appeals. Application of that interpretation to review of the specific ruling at issue

here—the military judge's decision to quash a subpoena requesting statements by the accused to the news media regarding events on the date of and in the place of the incident under investigation—is not likely to have an appreciable effect on the volume of prosecution appeals under Article 62. In light of the text, the legislative history, the decisions and experiences of courts applying the parallel provisions of 18 U.S.C. § 3731, and considerations of practicability, we conclude that the term "excludes evidence" in military law is not different from the term "excluding evidence" in federal civilian proceedings with respect to an interlocutory appeal of a decision to quash a subpoena for the production of evidence.

C. THE APPEAL IN THE PRESENT CASE

The question before us is not simply the generic question of whether Article 62, UCMJ, permits appeal of a motion quashing a subpoena, but whether the ruling at issue in this case had the direct effect of excluding evidence. In resolving that issue, we consider whether the military judge's ruling directly limited the pool of potential evidence that would be admissible at the court-martial. *See Watson,* 386 F.3d at 313. Appellant contends that the prosecution cannot appeal because the prosecution has not demonstrated that the outtakes contain any relevant, admissible evidence, contending that "the Government's assertions as to what might be contained in the CBS outtakes were mere speculation." The record before us, however, demonstrates that the outtakes contain statements by Appellant about the charged crimes, focusing on the events that transpired on the day and in the place of the alleged offenses. *See supra* Part I.B. Appellant also contends that the ruling is not appealable because "the 'admissions' that the Government speculates are in the outtakes are available from a number of other sources." However, the question of whether the material in the outtakes is cumulative goes to the merits of the ruling by

the military judge, not whether that ruling is appealable. *See infra* Part III.D.

According to Appellant, the military judge's ruling did not exclude evidence from the court-martial: "If the government ultimately obtains these outtakes through negotiation with CBS News or alternative means, it [sic] may well be admissible." On the record before us, CBS has sole possession and control of the outtakes. The record does not establish the existence of any negotiations or "alternative means" through which the Government could obtain the outtakes.

The record reflects that CBS does not believe that it is appropriate to provide the outtakes to the prosecution. CBS has litigated vigorously a motion to quash the subpoena as well as the present appeal. As part of that litigation, CBS has submitted a declaration from its correspondent, Mr. Pelley, asserting a variety of negative consequences to the newsgathering function that would follow "if reporters were to become known as willing or unwilling investigative agents for the Government." Under these circumstances, the record establishes that the military judge's decision had the direct effect of excluding the outtakes from the pool of potential evidence that would be admissible at the court-martial.

In a related argument, Appellant and Petitioner-CBS suggest that the military judge's decision to quash the subpoena is not appealable in this case because the military judge did not foreclose future consideration of the admissibility of the outtakes. The military judge, however, discussed that possibility in the context of a contingency under the control of the defense. During litigation of the motion to quash the subpoena at trial, the military judge asked trial defense counsel if he would object to introduction into evidence of the broadcast statements made by the accused. Defense counsel reserved the right to object under M.R.E. 106, the rule of completeness, which provides, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may

require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." *See also* M.R.E. 304(h)(2) (providing a rule of completeness in connection with an alleged admission or confession).

The rule of completeness is a rule that benefits the party opposing admission of evidence, not the party offering the evidence. Assuming that the prosecution moves to admit the broadcast statements, the defense would not be obligated to object under the rule of completeness. Defense counsel emphasized during discussion of the motion to quash the subpoena that the defense was "not required to assist the government in acquiring its evidence or the evidence it thinks it needs," and that defense counsel was not "required to anticipate what the government might try to do and announce all of my objections." Likewise, it is not possible to know at this stage whether the interests of Appellant in presenting the most effective defense in his trial by court-martial and the interests of CBS as a newsgathering entity will be similar or different during trial on the merits.

At this stage in the proceedings, the possibility of a future ruling on admissibility of the outtakes under the rule of completeness rests with the defense. Moreover, without having the content of the outtakes in the record, there is no way of knowing which parts, if any, of the outtakes would be covered by the rule of completeness. Under these circumstances, the contingent possibility that an opposing party might raise an objection that could resurrect the need for a subpoena, which is dependent on multiple variables, does not diminish the direct effect of the ruling excluding the outtakes.

In the present case, the military judge ruled that the evidence requested in the subpoena was cumulative with the evidence otherwise available to the prosecution. *See supra* Part I.C. In so doing, he focused specifically on the pool of potential evidence that would be admissible at the court-martial. As such, his decision to quash the subpoena

was appealable under Article 62, UCMJ, because it had a direct effect on whether the outtakes would be excluded from consideration at the court-martial.

D. THE MILITARY JUDGE'S DECISION TO QUASH THE SUBPOENA

The question before us is whether the military judge in this case erred when he granted the motion to quash the subpoena on the grounds that it was unnecessary without reviewing in camera the evidence requested. *See supra* Part I.C.; R.C.M. 703(f)(1). We review the military judge's decision under an abuse of discretion standard. *See United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987).

In trials by courts-martial, "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, 10 U.S.C. § 846 (2000). The President has provided that the parties and the court-martial "shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." R.C.M. 703(a). Under R.C.M. 703(f)(1), "Each party is entitled to the production of evidence which is relevant and necessary." M.R.E. 401 establishes "a low threshold of relevance." *Reece*, 25 M.J. at 95 (quoting *United States v. Tomlinson*, 20 M.J. 897, 900 (A.C.M.R. 1985)). As noted in the nonbinding Discussion accompanying R.C.M. 703(f)(1): "Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *See Reece*, 25 M.J. at 95.

R.C.M. 703(f)(4)(C) provides: "If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive . . . the military judge may direct that the subpoena or order of production be withdrawn or modified." Under the rule, "the military

judge may direct that the evidence be submitted to the military judge for an in camera inspection in order to determine whether such relief should be granted."

Reece considered these provisions on direct review of a case in which the military judge had declined to review in camera the social service and counseling records of two witnesses. 25 M.J. at 94-95. The defense at trial had asserted that records of drug and alcohol abuse, as well as behavioral problems, were relevant to the credibility of the witnesses. On appeal, this Court observed that the credibility of the two witnesses was a key issue at trial and that the appellant had "made as specific a showing of relevance as possible, given that he was denied all access to the documents." *Id.* at 95. Under the circumstances of the case, *Reece* held that the military judge erred in not conducting an in camera review of the requested materials, and remanded the case for in camera inspection by a military judge under *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). 25 M.J. at 95; *cf. United States v. Cuthbertson*, 630 F.2d 139, 145-46, 148-49 (3d Cir. 1980) (holding that the trial judge did not err in requiring an in camera review of trial witness statements when there was a showing of relevancy, necessity, and specificity, but erred in requiring an in camera review of non-witness statements without such a showing).

In the present case, Appellant argues that the military judge did not err in quashing the subpoena because "[t]here is no reason to believe that there are material statements in excess of what CBS aired on March 17, 2007, as Petitioner's [Appellant's] statements are relatively uniform and indicative of his subjective intent." Appellant further contends that—

> the government also has a wealth of additional evidence that can be used to demonstrate [Appellant's] specific intent, including forensic evidence, the testimony of all of [Appellant's] squad members, and secondary evidence. The

> testimony of Appellant's squad members is indicative of his specific intent, as he trained his squad on the rules of engagement and their understanding of the rules of engagement mirrors his. Appellant's subjective intent is clear from his multiple statements—he declared the buildings and anyone within hostile and authorized the use of force. He repeatedly admitted to telling them to "shoot first and ask questions later."

(citations omitted). In similar fashion, Petitioner-CBS notes that the record is replete with other evidence available to the Government on the contested issues in the court-martial. Petitioner-CBS further suggests that an in camera review of the outtakes is unnecessary because "it is typically the case that the most relevant and important information is included in the publicly disseminated news report."

As we have noted earlier, Appellant granted an interview with CBS in which he specifically described events at the time and in the place of the charged offenses. CBS conducted the interview knowing that it involved matters then under investigation. The interview lasted for several hours, but only a portion of the interview was aired by CBS. The outtakes contain a majority of Appellant's discussion of the charged offenses with CBS, and only CBS possesses those outtakes. *See supra* Part I.B-C.

At this stage in the proceedings, Appellant has pled not guilty. Therefore, the issues of his specific intent and other key elements of the offenses remain in dispute. On the record before us, the case involves both direct and circumstantial evidence, including statements by Appellant. Both the prosecution and the defense will have the opportunity to demonstrate the inculpatory or exculpatory value of evidence that is introduced with respect to the charged offenses. Under those

circumstances, the level of detail, the context, and the credibility of the evidence is likely to be at issue.

In that setting, the decisions made by CBS as to what was relevant and important to include in a nationally broadcast news story are not the same as the judgment by the parties to the court-martial of what might be relevant and necessary in the trial of the pending case, which includes both general crimes and unique military offenses. Likewise, Appellant's assessment that his statements in the record reflect a consistent expression of intent is a matter that, at this stage in the proceedings, is likely to be subject to evaluation by the factfinder at trial. Moreover, Appellant's assessment does not describe the content of the statements in the outtakes.

In *Cuthbertson*, the Third Circuit addressed similar considerations in a case where a news organization sought to resist a subpoena that requested, in part, material containing "verbatim and substantially verbatim statements . . . of witnesses that the government intends to call at trial." 630 F.2d at 148. In sustaining the decision of the trial judge to order production of that material for in camera inspection, the court observed:

> By their very nature, these statements are not obtainable from any other source. They are unique bits of evidence that are frozen at a particular place and time. Even if the defendants attempted to interview all of the government witnesses and the witnesses cooperated with them, the defendants would not obtain the particular statements that may be useful for impeachment purposes at trial.

Id.; *accord United States v. LaRouche*, 841 F.2d 1176, 1180 (1st Cir. 1988) (sustaining the trial judge's decision to order production of outtakes of a news media interview with a key trial witness).

The outtakes of the CBS interview of Appellant about the events in Haditha on the date of the charged offenses, like the material at issue in *Cuthbertson* and *LaRouche*, constitute a potentially unique source of evidence that is not necessarily duplicated by any other material. Under the circumstances of the present case, consideration of whether the outtakes are cumulative requires review of the requested material by the military judge. The military judge's decision to quash the subpoena without conducting an in camera review of the requested material constituted an abuse of discretion.

E. FURTHER PROCEEDINGS

Petitioner-CBS based the motion to quash the subpoena in part on the grounds that the outtakes were protected by a qualified newsgathering privilege. Petitioner-CBS relied on principles related to the newsgathering process and did not claim that Appellant's statements were made under conditions of confidentiality. Although the military judge indicated agreement with the concept of a qualified newsgathering privilege, he found it unnecessary to base his decision on the privilege because he determined that the outtakes were cumulative.

Under M.R.E. 501(a)(4), a privilege may be claimed under "[t]he principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual." In the past, this Court has considered but has not resolved the question of whether a newsgathering privilege applies in the military justice system. *See United States v. Rodriguez*, 50 M.J. 38, 38 (C.A.A.F. 1998) (summary disposition). On appeal, the parties have referred to the question of whether a newsgathering privilege should be recognized in the military justice system, but they have not

asked this Court to resolve whether the subpoena in this case should have been quashed on a qualified newsgathering privilege. Under these circumstances, we do not decide here whether such a privilege should be recognized in the military justice system.

The issue of an in camera review is a separate matter. Even to the extent that a qualified privilege has been recognized by some courts in the trial of federal civilian cases, the application of such a privilege to an in camera review has been highly case specific. *See, e.g.*, *United States v. Burke*, 700 F.2d 70, 76-78 (2d Cir. 1983); *Cuthbertson*, 630 F.2d at 146-49. In that context, even if a qualified privilege applied to cases in the military justice system—a matter that we do not decide here —such a privilege would not preclude an in camera review pursuant to R.C.M. 703(f)(4)(C) under the circumstances of the present case. The description of the material at issue in the present case—video outtakes from a specific interview in which Appellant discussed the events occurring on the date of and in the place of the charged offenses—is sufficient to meet a threshold showing of necessity for an in camera review. The military judge could not make an evaluation of necessity under the specific circumstances of this case without reviewing the outtakes for content and context. *See supra* Part III.D. Accordingly, we conclude that the military judge in the present case must conduct an in camera review of the requested materials prior to ruling on the motion to quash the subpoena.

In any further hearing before the military judge on a motion to quash the subpoena, the military judge alone will inspect the requested materials in camera. Such a hearing, accompanied by inspection of the requested material in camera by the military judge alone, will provide the appropriate forum for consideration of issues pertinent to a motion to quash the subpoena, such as the existence, if any, of a qualified newsgathering privilege under M.R.E. 501(a)(4), the scope of any such privilege, and the

application, if any, of such a privilege to the requested materials.

Our decision to order inspection in camera by the military judge alone pertains to the present case. We do not decide here whether, under other circumstances, inspection by the parties under an appropriate protective order would be warranted. *See Reece*, 25 M.J. at 95 n.6.

IV. DECISION

We vacate the decision of the United States Navy-Marine Corps Court of Criminal Appeals and the order of the military judge quashing the Government's subpoena. We remand the record of trial to the Judge Advocate General of the Navy for return to the military judge for further consideration of whether relief should be granted to Petitioner-CBS under R.C.M. 703. Prior to ruling, the military judge shall order production of the requested material for in camera inspection by the military judge alone.

RYAN, Judge, with whom ERDMANN, Judge, joins (dissenting):

I agree that Appellant has standing to litigate the Government's appeal of the military judge's ruling quashing a third-party subpoena. *United States v. Wuterich*, __ M.J. __ (19-21) (C.A.A.F. 2008). However, because the Government's appeal in this case is an appeal of the military judge's ruling on a discovery motion—a ruling that expressly noted that the object of the discovery could be admissible[1]—and not "[a]n order or ruling which excludes evidence," I disagree that the United States Navy-

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[1] Transcript of Record at 87, *United States v. Wuterich* (Feb. 22, 2005) (Article 39(a), UCMJ, session) ("[T]he court clearly finds that this could be admissible into the evidence as statements of the accused under Military Rule of Evidence 801(d).").

Marine Corps Court of Criminal Appeals (CCA) had jurisdiction under Article 62 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2000), to hear the Government's appeal. That the CCA had no jurisdiction under the facts of this case is supported both by the precedent of this Court and the precedent of the United States Court of Appeals for the First Circuit. *See United States v. Browers*, 20 M.J. 356, 360 (C.M.A. 1985) (defining "exclusion" as used in Article 62(a)(1)(B), UCMJ, as a ruling involving inadmissibility); *United States v. Watson*, 386 F.3d 304, 310 (1st Cir. 2004) ("[The Criminal Appeals Act] unarguably restricts government appeals to specific categories of district court orders. If an order falls outside those categories, the government's attempted appeal must be dismissed.") (citation omitted).

A. Statutory authorization for a government appeal

In criminal cases, prosecution appeals are not favored and are available only upon specific statutory authorization. *See United States v. Wilson*, 420 U.S. 332, 336 (1975); 7 Wayne R. LaFave et al., *Criminal Procedure* §27.3(a)-(b) (3d. ed. 2007). Specifically relevant to this case, Article 62(a)(1)(B), UCMJ, grants the Government the authority to appeal "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Article 62(b), UCMJ, grants the CCA the jurisdiction to hear those appeals.

B. "Order or ruling which excludes evidence"

This Court previously adopted a narrow construction of the language in Article 62, UCMJ, permitting the government to appeal from an order or ruling "which excludes evidence that is substantial proof of a fact material in the proceeding." *Browers*, 20 M.J. at 359-60. In *Browers*, the Court differentiated appealable decisions

from unappealable ones by asking whether the military judge made a ruling involving the admissibility of the evidence. Writing for the Court, former Chief Judge Everett defined "excludes evidence" to mean "a ruling made at or before trial that certain testimony, documentary evidence, or real evidence is *inadmissible*." *Id.* at 360 (emphasis added). The Court acknowledged that this interpretation might result in a party being deprived of critical evidence, but expressed confidence in the "ability of military judges to make these delicate determinations." *Id.*

Inexplicably, the majority dismisses former Chief Judge Everett's definition in *Browers*, a decision of this Court, as mere "observations." *Wuterich*, __ M.J. at __ (31). If the current majority has a different take on what the definition of "excludes" should be, as it is entitled to have, it should say so and explicitly overrule *Browers* rather than mischaracterize a holding of this Court.[2]

The majority suggests that *Browers* "concluded that the order was not appealable because it involved the question of trial scheduling, not the exclusion of evidence." *Wuterich*, __ M.J. at __ (30). *Browers* made no such conclusion, as the Court's language plainly demonstrates. *Browers* explicitly states that "the issue is whether denial of a continuance requested so that the Government may produce a material witness constitutes the exclusion of evidence." *Browers*, 20 M.J. at 360 (emphasis in original). The *Browers* Court concluded that the denial of a continuance was not an appealable ruling because it was not an order that "excludes evidence" despite the fact that the ruling prevented the government from presenting two material witnesses. The scheduling ruling in *Browers*, like

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[2] Any relevance of the Court's composition during *Browers*, which the majority appears to suggest weighs against the precedential value of the opinion, *Wuterich*, __ M.J. at __ (32), is unclear at best. Chief Judge Everett delivered the opinion of the Court; Judge Cox, while writing separately to concur in *Browers*, did not disagree with Judge Everett's opinion in general or his definition of "excludes" in particular.

the discovery ruling in this case, deprived the government of evidence, but did not "exclude" evidence for purposes of Article 62, UCMJ.

If any doubt remained as to the Court's intentions in *Browers*, former Chief Judge Everett later repeated the definition of "excludes evidence" as a ruling that "evidence is inadmissible," and stated that, in *Browers*, this Court "adopted a narrow construction of the statutory language." *United States v. True*, 28 M.J. 1, 5 (C.M.A. 1989) (Everett, C.J., dissenting) (citing *Browers*, 20 M.J. at 360).[3]

One would think that *Browers* ends the inquiry as to the meaning of Article 62(a)(1)(B), UCMJ. This Court concluded that "excludes" was a term of art relating to admissibility of evidence and saw "no reason to believe that Congress had any different intention in drafting Article 62(a)(1)." *Browers*, 20 M.J. at 360. This narrow view is consistent with the Supreme Court's instruction that the government could only take an appeal in a criminal case if

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[3] The Court in *True* considered whether the ruling of the military judge, which abated the court-martial, was one "which terminates the proceedings," not whether it was one "which excludes evidence." 28 M.J. at 2. On that point Chief Judge Everett agreed. *Id.* at 5 (Everett, C.J., dissenting). While all federal circuits to have considered the issue agree that the analogous language in the first paragraph of 18 U.S.C. § 3731 ("a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment") should be construed broadly, *see, e.g.*, *Watson*, 386 F.3d at 308 (crediting "Congress's intent that all such orders would be appealable unless the Double Jeopardy Clause forbade that course of action"), only the Fifth Circuit reads "suppresses or excludes evidence" as broadly. *See United States v. Smith*, 135 F.3d 963, 967 (5th Cir. 1998) (holding that § 3731 provides the government with as broad a right to appeal an order suppressing or excluding evidence as the Constitution will permit). Consequently the breadth of the language in *True*, applicable to statutory language regarding "terminates the proceedings," is of doubtful weight when considering the different language "excludes evidence." While the former directly implicates the Double Jeopardy Clause, *Wilson*, 420 U.S. at 336-37 (1975), the latter does not.

it had express statutory authority, *Wilson,* 420 U.S. at 336, and its policy against piecemeal appeals in criminal cases, "where the defendant is entitled to a speedy resolution of the charges against him." *Will v. United States*, 389 U.S. 90, 96 (1967); *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

But despite *Browers*, the majority looks to the parallel federal statute, 18 U.S.C. § 3731, in search of a different definition of "an order or ruling which excludes evidence" as specified by Article 62, UCMJ. The majority states that it agrees with the First Circuit's approach that defines rulings excluding evidence under § 3731 as ones that "'either in substance or in form, limit the pool of potential evidence that would be admissible.'" *Wuterich*, __ M.J. at __ (33) (quoting *Watson,* 386 F.3d at 313). I do not believe, however, that the precedent of the First Circuit supports the Court's holding today.

The First Circuit, noting Congress's instruction that § 3731 should be construed liberally, concludes only that "the second paragraph of section 3731, in its present form, covers all pretrial orders that deny *admissibility* to virtually any evidence on virtually any ground." *Watson,* 386 F.3d at 309 (emphasis added). In *Watson*, a case with a fact pattern similar to that of *Browers*, the government attempted to appeal from a trial judge's denial of a government motion requesting a continuance. Without the continuance, the government could not depose a key witness and would be forced to prosecute *Watson* without the benefit of the witness's testimony. *Id.* at 307. The First Circuit held that it had no jurisdiction under § 3731 to hear the government's appeal because the trial court was not engaged in making an evidentiary ruling. *Id.* at 311. The court rejected the government's argument that the trial court's rulings were a but-for cause of the government's inability to gather or present evidence at trial. *Id.* The court explicitly distinguished between available and admissible evidence, stating that "[a]lthough

the orders appealed from *will certainly hamper (and may effectively prevent) the obtaining and subsequent use* of [the witness's] testimony, those orders did not, either in substance or in form, limit the pool of potential evidence that would be *admissible* at the forthcoming trial." *Id.* at 313 (emphasis added). For the First Circuit, admissibility, rather than availability, is the critical factor in determining when the government may appeal an order under § 3731. As in *Browers*, even though the trial court's ruling would "certainly hamper (and may effectively prevent) the obtaining and subsequent use" of a witness's testimony, the First Circuit still held that the ruling did not exclude evidence. *Id.* The First Circuit's approach is consistent with this Court's position in *Browers*, and different than today's decision, which implies that any decision that limits the pool of available evidence would be appealable under Article 62, UCMJ.

The majority's decision is also contrary to the approach favored by the other federal courts of appeals, which reject the argument that any trial court order or ruling that hampers or effectively prevents the obtaining or use of evidence is appealable by the government under § 3731. *See, e.g.*, *United States v. Hickey*, 185 F.3d 1064, 1066-67 (9th Cir. 1999) (finding no jurisdiction to hear appeal from order denying government's request to unseal defendant's financial affidavits); *United States v. Camisa*, 969 F.2d 1428, 1429 (2d Cir. 1992) (finding no jurisdiction to hear appeal from order denying government's request to disqualify defendant's counsel which possibly rendered a witness's testimony inadmissible). As the First Circuit stated, "[w]hatever incidental effect those orders may have on evidentiary matters, they are simply not the proximate cause of the exclusion of any evidence." *Watson,* 386 F.3d at 312.

C. The majority's rule is not supported by the decisions of the federal courts of appeals

The majority suggests that its approach, in the context of the facts of this case, is consistent with the approach of other federal circuits. *See Wuterich*, __ M.J. at __ (27-29) ("The courts of appeals have addressed the meaning of the term 'excluding evidence' under 18 U.S.C. § 3731 and have concluded that the term includes an order quashing a subpoena."). I disagree. In fairness, the federal courts of appeals have at times permitted appeals under 18 U.S.C. § 3731 in cases involving the quashing of subpoenas in the context of grand jury investigations. *See, e.g., In re Grand Jury Subpoenas (Kiefaber)*, 774 F.2d 969, 972-73 (9th Cir. 1985), *vacated on other grounds*, 823 F.2d 383 (9th Cir. 1987); *In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 856 (3d Cir. 1979). But each of those cases relied on the precise language—"[t]he provisions of this section shall be liberally construed to effectuate its purposes"—in § 3731 that is not present in Article 62, UCMJ. *See Kiefaber*, 774 F.2d at 972-73 ("Therefore, in light of the legislative direction to construe broadly the phrase 'suppressing or excluding evidence,' we conclude that the district court's order quashing the grand jury subpoenas constitutes an order suppressing or excluding evidence.") (footnote omitted); *Colucci*, 597 F.2d at 856 ("In light of this legislative direction to construe broadly the government's right of appeal, this Court has held that orders which do not, 'strictly speaking,' suppress evidence but which have the 'practical effect' of excluding evidence from a proceeding, are within the ambit of [section] 3731."). Yet this is the very language upon which the majority claims not to rely in construing Article 62, UCMJ. *Wuterich*, __ M.J. at __ (26) ("[I]t would be inappropriate to apply the liberal construction mandate of section 3731 when interpreting Article 62, UCMJ."). And, of course, at the pre-indictment grand jury stage an individual is a target, not a defendant, so there is not yet any Sixth Amendment

speedy trial concern. *See United States v. Marion*, 404 U.S. 307, 313 (1971) ("[The Sixth Amendment] would seem to afford no protection to those not yet accused, nor would [it] seem to require the Government to discover, investigate, and accuse any person within any particular period of time.").

D. The majority's holding is overly broad

The problems with the majority's new position are twofold. First, it highlights that *Browers* is being overruled sub silentio. The military judge's ruling at issue in *Browers* clearly limited the pool of evidence that was available to the government to proffer at trial by preventing the government from presenting two material witnesses, yet this Court held that the ruling did not exclude evidence for the purposes of Article 62, UCMJ. One cannot reconcile today's holding with the precedent of this Court in *Browers*.

This highlights the second problem with the majority's position. Although the majority expressly states that a liberal construction of Article 62, UCMJ, is not warranted, its holding is extraordinarily broad. *See Wuterich*, __ M.J. at __ (25-26) (stating that because Article 62, UCMJ, contains no language on statutory interpretation, it would be inappropriate to apply § 3731's liberal construction mandate when interpreting Article 62). If one accepts that any order or ruling that limits the pool of evidence that is available to the government is appealable under Article 62(a)(1)(B), then any ruling by a military judge that impacts the availability, as opposed to the admissibility, of evidence would be a proper subject of a government appeal. Under the majority's new rule there is no principled way to distinguish among: garden-variety scheduling orders, such as those at issue in *Browers*, which hindered the government's ability to offer a witness's testimony; discovery rulings of any sort that go against the

government; and actual rulings on the admissibility of evidence.

The majority relies heavily on the fact that *Browers* and *Watson* considered what it characterizes as case-management orders to distinguish the holdings in those cases from the majority's broad interpretation of § 3731 and Article 62, UCMJ. *See Wuterich*, __ M.J. at __ (28-31). Presumably, the majority believes that trial scheduling orders may "limit the pool of potential evidence" without qualifying under Article 62, UCMJ, solely because trial scheduling falls within the sound discretion of the trial judge. Of course, neither case rested on that fact. Moreover, discovery rulings, as the one in the instant case undoubtedly is, may "limit the pool of potential evidence" and are also within the sound discretion of the trial court. *See, e.g.*, *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 898 (D.C. Cir. 2006) ("[T]he district court has wide discretion in managing discovery."); Faigin v. Kelly, 184 F.3d 67, 84 (1st Cir. 1999) ("A district court's case-management powers apply with particular force to the regulation of discovery and the reconciliation of discovery disputes."); *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir. 1999) ("Matters of discovery are in the sound discretion of the district court."). Both types of decisions being within the discretion of a trial court and potentially or actually limiting the pool of potential evidence, the only distinction available appears based on ad hoc decisions by this Court. This is a less-than-workable legal standard.

E. Admissibility is the touchstone

A military judge's ruling quashing a subpoena duces tecum is a discovery ruling, which may impact the availability of evidence, but it neither denies the admissibility of the evidence nor excludes it. This distinction is an important one that should make a difference based on the explicit language of Article 62(a)(1)(B), UCMJ. Courts faced with a motion to quash a

subpoena duces tecum in a criminal case consider more than admissibility—they balance the general public's duty to testify, *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), against other interests, such as the burden placed on the recipient of the subpoena, *see United States v. Nixon*, 418 U.S. 683, 698 (1974), and the explicitly stated goal of expediting the defendant's trial. *See id.* The balancing is contextual and uses a four-factor test articulated by Judge Weinfeld of the United States District Court for the Southern District of New York and adopted by the Supreme Court in *Nixon*, 418 U.S. at 699-700 (citing *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).[4] [4] The Weinfeld factors are important because they illustrate the difference between discovery rulings and evidentiary orders, a difference the majority ignores.

Under the Weinfeld test, the moving party cannot require production of documents prior to trial unless that party shows:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id.

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[4] The Drafters' Analysis for Rule for Courts-Martial (R.C.M.) 703(e) also cites *Nixon* in its discussion of the purpose of a subpoena duces tecum. *Manual for Courts-Martial, United States*, Analysis of the Rules for Courts-Martial app. 21 at A21-37 (2008 ed.).

It may be that a court quashes a subpoena based on the first Weinfeld factor—lack of relevancy. If so, this would be a ruling on the admissibility of evidence and fall within *Browers* and *Watson*, even if styled a discovery order by the trial judge. In contrast, the other three Weinfeld factors do not weigh or consider whether the evidence is admissible. Rather, the second factor considers the burden placed on the party receiving the subpoena, the third factor considers the potential impact on the defendant's right to a speedy trial, and the fourth factor protects parties from unwarranted requests. These factors address equitable considerations that protect the rights of third parties and the defendant, not evidentiary concerns.

As the United States Court of Appeals for the District of Columbia Circuit stated in a case involving a government appeal, an order regarding a subpoena in no way finally decides that any of the subpoenaed material must be denied to the jury and "cannot be deemed an order 'suppressing or excluding evidence,' or otherwise within the contemplation of the Criminal Appeal Act, 18 U.S.C. § 3731." *Nixon v. Sirica*, 487 F.2d 700, 707 n.23 (D.C. Cir. 1973). Denials of discovery requests may ultimately make evidence unavailable, but not all such denials are or should be—appealable under Article 62, UCMJ, because they usually do not address the admissibility of the evidence.

F. No ruling that evidence is inadmissible in this case

In this case the ruling of the military judge did not exclude evidence in any evidentiary sense, although the ruling may have, or even will have, the effect of making the evidence unavailable. The military judge not only refrained from ruling that the subpoenaed tapes were inadmissible, he opined that they likely were. Transcript of Record at 87, *Wuterich* (Article 39(a), UCMJ, session) ("|T|he court clearly finds that this could be admissible into the evidence as statements of the accused under Military

Rule of Evidence 801(d)."). In his words, the order was a "discovery denial." Transcript of Record at 93, *Wuterich* (Article 39(a), UCMJ, session). Although the military judge's ruling "will certainly hamper (and may effectively prevent) the obtaining and use" of the outtakes by the Government, the ruling "did not, either in substance or in form, limit the pool of potential evidence that would be *admissible* at the forthcoming trial." *Watson*, 386 F.3d at 313 (emphasis added).

As CBS acknowledged at oral argument, if the Government obtains possession of the outtakes, nothing in the military judge's order would prevent the Government from proffering the outtakes as evidence. Transcript of Oral Argument at 00:35:25, *Wuterich*, Nos. 08-6006, 08-8020, 08-8021. This is because it was not an order "which excludes evidence." The majority ignores this salient fact, and focuses instead on a straw man—the possibility that the Government could obtain the outtakes through negotiation or other means, a possibility it then dismisses. *Wuterich*, __ M.J. at __ (37-38).

Of course this goes to availability, not admissibility, and is not relevant for purposes of Article 62(b), UCMJ. Further, I note that CBS attempted to work with the Government by providing the *60 Minutes* broadcast, offering to authenticate it, and requesting materials from the Government to help determine whether the outtakes were indeed cumulative. In response, the Government refused either to accept the broadcast or to provide CBS with the requested materials. CBS Broadcasting Inc.'s Petition for a Writ of Prohibition and/or Mandamus at 3-4, 5 n.3, *United States v. Wuterich*, No. 08-8020 (C.A.A.F. July 10, 2008); Transcript of Oral Argument at 00:27:54, *Wuterich*, Nos. 08-6006, 08-8020, 08-8021. Given the fluid nature of third-party discovery in practice, there is no basis for concluding that absence of progress in light of the Government's lack of cooperation is evidence of the futility of negotiations.

G. Appellant's trial

The previous construction of Article 62, UCMJ, by this Court in *Browers* was narrow, consistent with the precept that government appeals are disfavored and only permitted where expressly authorized by statute, and consonant with the policy against piecemeal appeals in criminal cases, "where the defendant is entitled to a speedy resolution of the charges against him." *Will*, 389 U.S. at 96; *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *Watson*, 386 F.3d at 310 ("Section 3731 was 'carefully circumscribed by Congress out of a desire (among other reasons) to safeguard individuals from the special hazards inherent in prolonged litigation with the sovereign.'") (quoting *United States v. McVeigh*, 106 F.3d 325, 330 (10th Cir. 1997)); *United States v. Kane*, 646 F.2d 4, 7 (1st Cir. 1981) (cautioning that if interlocutory orders related to discovery and other preliminary matters were appealable under the second paragraph of section 3731, "defendants' rights to a speedy trial could be subverted").

As this case demonstrates, these principles, and the impact of expansive jurisdiction under Article 62, UCMJ, are of more than academic concern. This is especially true in the military justice system, where defendants' detailed military counsels are subject to reassignment and retirement. Appellant's trial was automatically stayed under R.C.M. 908 in February 2008 by the Government's interlocutory appeal of the military judge's granting of a motion to quash a third-party subpoena. *See* R.C.M. 908(b)(4) (providing an automatic stay of a court-martial pending disposition by the CCA of an interlocutory government appeal).[5] During that period Appellant lost the

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[5] The majority implies that the Government's appeal to this Court has not delayed this case—as if Appellant's court-martial might somehow proceed in parallel to the appellate proceedings currently before this

representation of both of his detailed military counsel due to retirement. Appellant's Reply at 1, *United States v. Wuterich*, No. 08-6006 (C.A.A.F. Sept. 2, 2008); Transcript of Oral Argument at 00:46:41, *Wuterich*, Nos. 08-6006, 08-8020, 08-8021. The Government concedes that these losses may prejudice Appellant's defense. Transcript of Oral Argument at 00:47:26, *Wuterich*, Nos. 08-6006, 08-8020, 08-8021.

And to what end? Common sense suggests that CBS endeavored to make the *60 Minutes* segment at issue as newsworthy as possible, which at least recommends the idea that to the extent Appellant made incriminating, shocking, or newsworthy statements, they are almost certainly in the broadcast, which CBS provided to the Government. Despite the absence of any support for the suggestion that the contested outtakes contain anything new, and despite the fact the Government conceded at argument that it has evidence on every element of every offense,[6] the majority's ruling allows the Government to continue to litigate this issue and further prejudice Appellant's defense. Under the *Browers* construction, the CCA's opinion would be vacated for lack of jurisdiction and Appellant's trial would proceed apace.

Conclusion

Appellant challenges the jurisdiction of the CCA to hear the Government's appeal of a military judge's ruling

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Court—because this Court has not granted a stay. Of course the court-martial has not proceeded, and it seems strange to suggest that it would while the Court entertained this appeal. In any event, the dearth of statutory procedures relating to whether a proceeding after the appeal to the CCA is stayed illustrates the concerns I previously raised regarding this Court's assumption of jurisdiction to hear Article 62, UCMJ, appeals—the statute does not countenance the involvement of this Court. *See United States v. Lopez de Victoria*, 66 M.J. 67, 74-77 (C.A.A.F. 2008) (Ryan, J., joined by Erdmann, J., dissenting).

[6] Transcript of Oral Argument at 00:45:44, *Wuterich*, Nos. 08-6006, 08-8020, 08-8021.

quashing a subpoena. This Court has previously stated that the "jurisdiction of courts is neither granted nor assumed by implication" and that "[t]hat maxim is particularly apt in the case of an Article I court whose jurisdiction must be strictly construed." *Loving v. United States*, 62 M.J. 235, 244 n.60 (C.A.A.F. 2005) (citations and quotation marks omitted). The majority concludes that the CCA has jurisdiction over a military judge's order quashing a third-party subpoena, an order that did not rule that any evidence was inadmissible. I believe that this is an unwarranted expansion of the CCA's jurisdiction that cannot be justified by the language of Article 62(a)(1)(B), UCMJ. Because the majority's holding mischaracterizes this Court's prior ruling in *Browers*, threatens defendants' Sixth Amendment right to a speedy trial, and opens the door to interlocutory appeals from discovery rulings, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Misc. Dkt. No. 08-6006/MC
Crim. App. Dkt. No. 200800183

United States, Appellee

v.

Frank D. WUTERICH, Appellant

ORDER

On consideration of Appellant's petition for reconsideration of this Court's opinion issued on November 17, 2008, it is, by the Court, this 12thth day of December, 2008,

ORDERED:

That said petition for reconsideration is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

APPENDIX C

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS WASHINGTON, D.C.

Before
D.E. O'TOOLE, F.D. MITCHELL, J.F. FELTHAM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

FRANK D. WUTERICH
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 200800183
Review Pursuant to Article 62, Uniform Code of Military Justice,
10 U.S.C. § 862.

Military Judge: LtCol Jeffrey G. Meeks, USMC.
Convening Authority: U.S. Marine Forces Central Command, Macdill AFB, FL.
For Appellant: LT Timothy H. Delgado, JAGC, USN.
For Nominal Appellee: Maj Christian J. Broadston, USMC; LT Kathleen L. Kadlec, JAGC, USN.
For Non-Party Appellee: Mr. Lee Levine, Esq., Mr. Seth D. Berlin, Esq., and Ms. Nicole Auerbach, Esq.

20 JUNE 2008

PUBLISHED OPINION OF THE COURT

FELTHAM, Senior Judge:

This case is before us on a Government interlocutory appeal, pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862, and RULE FOR COURTS-MARTIAL 908, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The Government contends that the military judge erred as a matter of law when he quashed a Government subpoena for videotape and other material owned by CBS Broadcasting Inc. ("CBS"), which material purportedly includes several hours of an interview conducted by a CBS News correspondent with Staff Sergeant (SSgt) Wuterich, here the nominal appellee. We have carefully considered the record of the proceedings, the Government's brief on appeal, and non-party CBS's reply brief. We conclude that the military judge abused his discretion in quashing the Government subpoena on the basis that the requested evidence was cumulative, without first conducting an *in camera* review of the evidence.

Background

The nominal appellee (hereinafter, appellee) is charged, *inter alia*, with dereliction of duty and the voluntary manslaughter of 14 Iraqi men, women, and children, at or near Haditha, Iraq, in the aftermath of a roadside bombing that killed a Marine in the appellee's convoy. After being charged, the appellee participated in an interview with Mr. Scott Pelley, a CBS News correspondent. This interview led to the production of a *60 Minutes* broadcast segment. During the broadcast, the appellee described what happened during the bombing of his convoy and its aftermath, including the circumstances under which the civilians were killed. The Government

issued a subpoena for "any and all video and/or audio tape(s), to include out-takes and raw footage" of appellee's interview with Mr. Pelley. CBS provided the publicly broadcast footage, but, citing a "news-gathering" privilege under the First Amendment, declined to provide any audio-video material that had not been broadcast, including out-takes. CBS then moved to quash the subpoena. After reviewing the broadcast *60 Minutes* segment, the military judge found that it was "clearly" relevant and material. However, without having viewed the material that had not been broadcast, the military judge concluded that it was not necessary because it was cumulative of written statements submitted to the court for consideration on the motion, and of other information available to the Government. The military judge granted CBS's motion to quash. The Government responded with this interlocutory appeal.

Jurisdiction

We begin with a discussion of our authority to decide this matter. CBS argues that the decision to quash the subpoena is not an evidentiary ruling that excludes evidence and, therefore, does not fall within our jurisdiction to review under Article 62(a)(1)(B), UCMJ. We disagree.

Article 62(a)(1)(B), UCMJ, confers upon this court jurisdiction over Government appeals from orders or rulings by a military judge, presiding at a court-martial which may adjudge a punitive discharge, that, *inter alia*, "exclude[] evidence that is substantial proof of a fact material to the proceeding." The opinions of our superior court interpreting Article 62, as well as the legislative history of that statute, establish that "Article 62 was intended by Congress to be interpreted and applied in the same manner as the [federal] Criminal Appeals Act, 18 U.S.C. § 3731." *United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995). *See United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). In other words, Article 62 ensures

that the Government has the same opportunity to appeal adverse trial rulings that the prosecution has in federal civilian criminal proceedings. *United States v. Lopez de Victoria*, 66 M.J. 67, 71 (C.A.A.F. 2008). The federal Criminal Appeals Act permits the United States to appeal orders "suppressing or excluding" evidence in criminal cases where "the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731. There is no military case law addressing whether the Government may appeal a decision of the military judge to quash a Government subpoena issued to a non-party. There is significant case law from Article III Courts that have interpreted and applied 18 U.S.C. § 3731. Since Article 62, UCMJ, is intended to parallel that statute, we may look to the federal courts for guidance in interpreting our jurisdictional authority.

Article III courts have broadly construed the scope of 18 U.S.C. § 3731 by utilizing an "effects" test.[1] This test focuses on the effect of a court order or ruling rather than its facial categorization or title. *United States v. Margiotta* 662 F.2d 131 (2d Cir. 1981); *United States v. Humphries*, 636 F.2d 1172, 1175 (9th Cir 1980). In *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998), the United States

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[1] This court and our superior court have both applied what amounts to an "effects" test in determining jurisdiction to hear appeals under Article 62, UCMJ, but not in the context of an appeal of a military judge's order to quash a Government subpoena. *See United States v. Taylor*, 60 M.J. 720, 725 (N.M.Ct.Crim.App. 2004)(military judge's imposition of a sanction against the Government [preventing the Government from presenting the testimony of a confidential witness] if the Government refused to disclose evidence the military judge determined to be relevant and material "was the functional equivalent of an order excluding evidence"); *United States v. True*, 28 M.J. 1 (C.M.A. 1989)(military judge's abatement order, issued when the Government refused to pay for expert investigative assistance for the defense [after the military judge granted a defense request for such assistance] was the "functional equivalent" of a ruling that terminated the proceedings of the court-martial). Here, barring the Government from obtaining the evidence sought functionally prevents the Government from presenting that evidence at trial.

Court of Appeals for the Fifth Circuit was presented with a Government appeal in which the facts and issues were almost identical to those in the case at bar. In *Smith*, the United States sought a subpoena for the production of a videotaped interview of a criminal defendant conducted by a local television station. That television station moved to quash the subpoena on First Amendment grounds, claiming a "news reporter's privilege." The district court quashed the subpoena, and the Government appealed. In concluding it had jurisdiction to decide the matter, the Fifth Circuit held that § 3731 "provides the government with as broad a right to appeal as the Constitution will permit." *Smith*, 135 F.3d at 967 (citing *United States v. Wilson*, 420 U.S. 332, 337 (1975)). The court of appeals specifically found it had jurisdiction pursuant to the federal statute because the district court order quashing the subpoena effectively "'suppresses or excludes evidence' . . . in a criminal proceeding" in which "the relevant United States Attorney 'certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is substantial proof of a fact material in the proceeding in a criminal proceeding.'" *Id.*

Though there is a difference in the wording of Article 62, UCMJ, and its federal civilian counterpart, we find no discernible difference between the effect of the term "suppress" and the term "exclude" as applied to evidence; the effect of both is to deprive the Government of the evidence sought, and its use at trial. More importantly, to limit our jurisdiction based on this minor difference in terms would create a significant discrepancy between when jurisdiction vests in the Article III courts of appeal and in the military appellate courts – a result that would clearly be contrary to the intent of Congress. *Brooks*, 42 M.J. at 486.

Finally, to invoke jurisdiction under § 3721, the relevant United States Attorney must certify that a federal appeal is taken because the evidence excluded is substantial proof of a material fact. The military system

differs in process, but includes essentially the same requirement. Government appeals must be perfected pursuant to the Rules for Courts-Martial, under which the trial counsel must certify that the evidence excluded is substantial proof of a fact material to the proceeding. RULE FOR COURTS-MARTIAL 908(b)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed). As well, the Judge Advocate General or his designee must decide whether to file the appeal. R.C.M. 908(c)(6). Thus, we need not be distracted by a preliminary determination of whether the evidence sought is both substantial and material; the certification by the trial counsel and the decision of the Judge Advocate General to perfect this appeal are sufficient to invoke jurisdiction as effectively as does the certification of a United States Attorney under the Criminal Appeals Act.

Accordingly, we hold that this court has jurisdiction under Article 62(a)(1)(B), UCMJ, to resolve a Government appeal challenging the military judge's order quashing a Government subpoena.

Standing of Nominal Appellee

At the hearing on the motion to quash, the appellee asserted that he was not a party to the dispute between CBS and the Government. Record at 32. Following the filing of the Government's interlocutory appeal, the appellee filed a motion to dismiss, a motion for leave to reply to the Government's answer to the motion to dismiss, and an answer to the Government appeal. At the direction of this court, the appellee also filed a brief in support of his standing to join the issues.

Whether an accused has standing to challenge evidence is generally analyzed in the context of Fourth Amendment rights and the reasonable expectation of privacy. *United States v. Salazar*, 44 M.J. 464, 464 (C.A.A.F. 1996). *See also United States v. Padilla*, 508 U.S. 77, 81 (1993)(accused lacked standing to challenge drugs

found in search of auto driven by co-conspirator). An accused may also have standing to object to evidence when some action of the Government has impacted the reliability of the evidence, such as in cases of "'coerced confessions, unlawful command influence, interference with the rights of confrontation or cross-examination,' or [interference with] 'the right to present evidence.'" *United States v. Johnson*, M.J. 53 M.J. 459, 462 (C.A.A.F. 2000)(quoting *United States v. Jones*, 52 M.J. 60, 64 (C.A.A.F. 1999). Similarly, some courts have recognized standing to challenge subpoenas issued to third parties on grounds other than Fourth Amendment. These cases turn on whether there is some other constitutionally recognized privacy or property interest. *In re Grand Jury Proceedings*, 814 F.2d 61, 67 (1st Cir. 1987)(citing *In re Special 1977 Grand Jury*, 581 F.2d 589 (7th Cir. 1978)(state attorney general had standing to challenge subpoenas served on his staff); *United States v. Finazzo*, 407 F. Supp. 1127, 1132 (E.D. Mich. 1975) (defendant had standing to temporarily enjoin subpoenas of records pertaining to his financial transactions).

The appellee raises none of the aforementioned interests, but asserts that his standing in the dispute between the Government and CBS derives from his having been charged with an offense, and because the Government designated him "appellee" in the caption of the Government's interlocutory appeal. These are wholly inadequate as the basis for standing. We, therefore, conclude that the appellee lacks standing. *See United States v. Smelley*, 33 C.M.R. 516, 524 (ABR 1963)(when a subpoena is used to compel a reluctant witness, it is only the witness who may take exception). *Accord United States v. Johnson*, 53 M.J. 459, 464 (C.A.A.F. 2000)(Gierke, J., concurring in the result).

Standard of Review

In reviewing a Government interlocutory appeal, this court may act only on matters of law. Art. 62(b), UCMJ; R.C.M. 908(c)(2). *See United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007), *cert. denied*, 127 S. Ct. 3029 (2007). "Within this restriction, the pertinent inquiry is the legal sufficiency of evidence *of record* supporting the judge's finding, not the existence of evidence -- or of potential evidence -- supporting a contrary holding." *United States v. Vangelisti*, 30 M.J. 234, 237 (C.M.A. 1990)(emphasis in original).

Unlike appeals under Article 66(c), UCMJ, we may not make findings of fact. Rather, we are "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). *See also*, *United States v. Lincoln*, 40 M.J. 679, 683 (N.M.C.M.R. 1994), *aff'd in part and set aside in part*, 42 M.J. 315, 321-22 (C.A.A.F. 1995). We have no "authority to find facts in addition to those found by the military judge." *Gore*, 60 M.J. at 185. If the findings of fact are incomplete or ambiguous, the appropriate remedy is a remand to clarify the findings or to make additional findings. *Lincoln*, 42 M.J. at 320. S*ee United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994); *United States v. Rittenhouse*, 62 M.J. 509, 514 (Army Ct.Crim.App. 2005), *rev. denied*, 63 M.J. 162 (C.A.A.F. 2006). "[W]e conduct a *de novo* review of the military judge's conclusions of law." *United States v. Davis*, 62 M.J. 533, 536 (N.M.Ct.Crim.App. 2005), *aff'd*, 63 M.J. 171 (C.A.A.F. 2006). We will not overturn a military judge's evidentiary decision unless that decision was "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(citations omitted)). A military "judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United*

States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2003)(citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

Motion to Quash

In evaluating the motion to quash the Government subpoena, the military judge "first applied the requirements of materiality, relevance, and necessity under Rule for Court-Martial 703(f)(1)" to the audio-video evidence. Record at 87-88. In so doing, he found that the contents of the *60 Minutes* broadcast were "clearly relevant as they are statements of the accused concerning his involvement in the charged offenses" and "the on-air interview clearly establishes the materiality and relevance of this evidence." *Id.* at 88. Having viewed the same broadcast as the military judge, we conclude that his findings of fact are supported by the record and his conclusions of law are correct. Though not specifically articulated by the military judge, his ruling implicitly concludes that this portion of the evidence was also necessary. We independently conclude that it is. Relevant evidence is necessary when it is not cumulative and contributes in a positive way to the proponent party's presentation of the case. R.C.M. 703(f)(1), Discussion. This aired portion of the CBS audio-video material includes detailed admissions by the appellee that are not contained in the other written statements before the court. This portion of the audio-video material, therefore, is not cumulative and it is necessary.

Moving to the unaired audio-video material, we will, for ease of reference, refer to this material as "out-takes." CBS asserted a claim of "news-gathering" privilege as the basis for a motion to quash the subpoena issued for all of its audio-video material, which necessarily included the out-takes. Rather than resolve the existence and applicability of the claimed privilege, the military judge moved to consider whether the unaired out-takes were relevant and necessary under R.C.M. 703. Unfortunately, he was at a

disadvantage in assessing that which he had not seen. The factual record could, perhaps, have been developed with testimony sufficient to allow the military judge to conclude that the broadcast segment was clearly relevant and necessary, but that the out-takes were not. This, however, was not done, probably because it was not possible to do so with testimony about the contents of a detailed audio-video interview.

The military judge did know the contents of the aired *60 Minutes* broadcast and the substantive information contained in the documents admitted into evidence for consideration on the motion.[2] These documents contained statements of the appellee and others. As already noted, the military judge concluded as a matter of law that the audio-video material he had seen was clearly relevant and material, notwithstanding the statements contained in the documents received into evidence. Without then developing the record regarding what was contained in the balance of the audio-video material, or the substantive information in the other categories of evidence he expected to be available to the Government, he concluded that the out-takes were cumulative and unnecessary. This decision is unsupported

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[2] CBS submitted 14 exhibits with its brief on the pretrial motion to quash (Appellate Exhibit XLII) and an additional five exhibits with its reply brief (AE XLIV). Record at 2. The Government likewise submitted five enclosures with its reply brief (AE XLIII). When asked by the military judge whether there were any other items of evidence with respect to the motion to quash, both CBS and the Government indicated that there was none. Record at 3. The record is reasonably clear that the military judge considered the substance of the documentary evidence submitted by CBS and the Government with their trial pleadings, including several statements of the appellee and other witnesses. The military judge did not have before him the substance of the other evidence to which he referred by source category. *Id.* at 86-87. The military judge simply noted there were other sources of information available to the Government, such as the statements of all members of the appellee's squad, forensic evidence, photographs and other physical evidence from the scenes of the offenses, and "a significant amount of secondary evidence" the military judge perceived would be introduced. *Id.* at 87.

by a sufficiently developed factual record, and it is at odds with the military judge's findings related to the *60 Minutes* broadcast, his conclusions of law, and the balance of information in the record. Under these circumstances, we hold his ruling is an arbitrary determination. *McDonald*, 59 M.J. at 430.

Ordinarily an *in camera* review would be the proper mechanism for resolving an evidentiary dispute involving a claim of privilege. *See United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F. 1998). *See also United States v. Huberty*, 53 M.J. 369 (C.A.A.F. 2000)(*in camera* review of an expert witness' credentials file); *United States v. Briggs*, 48 M.J. 143, 145 (C.A.A.F. 1998)(preferred practice is for the military judge to inspect medical records *in camera*); *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997)(*in camera* review of attorney work-product); *United States v. Branoff*, 38 M.J. 98 (C.M.A. 1993)(*in camera* review of law enforcement personnel records); *United States v. Reece*, 25 M.J. 93 (C.M.A. 1993)(*in camera* review of juvenile records). Indeed, in this case, the Government requested an *in camera* review of the undisclosed audio-video material, but the military judge summarily denied it. Record at 89.

In *United States v. Klemick*, 65 M.J. 576, 579-80 (N.M.Ct.Crim.App. 2006), we observed that there was no military or federal precedent establishing the legal standard to be applied by a military judge in deciding whether to conduct an *in camera* review. *Klemick* involved a medical records privilege recognized under MILITARY RULE OF EVIDENCE 513, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) and a patient who objected to the disclosure of psychiatric records. We held there that a threshold showing by the Government is required before an *in camera* review of the protected records may be conducted. That includes showing 1) a specific factual basis demonstrating a reasonable likelihood that the requested records would yield admissible evidence; 2) the information sought is not merely cumulative of other available

information; and 3) the moving party made reasonable efforts to obtain substantially similar information through non-privileged sources. *Klemick*, 65 M.J. at 580. Importantly, this is a threshold determination and, as such, the standard of proof is not high, because the moving party is not privy to what is actually contained in the records sought. *Id.* The holding in *Klemick*, though developed regarding psychiatric records, would seem to have equal application when a military judge is confronted with other types of information subject to an assertion of privilege, and we extend it to cover facts such as in this case.

We do not criticize the military judge for failing to specifically apply our holding from *Klemick*, however, we do find his characterization of the Government subpoena as "fishing" and his summary denial of a request for an *in camera* review to be unsupported by the record and, thus, to be arbitrary. We would ordinarily return the record to the military judge for additional findings of fact and conclusions of law. Here, however, we find the record sufficient to resolve the threshold issue.

The military judge determined that a subset of the contested out-takes -- the *60 Minutes* broadcast -- contained clearly relevant, material and admissible statements of the appellee. This mixed finding of fact and conclusion of law provides a specific basis demonstrating a reasonable likelihood that the whole of the requested out-takes -- the source of the broadcast footage -- would also yield admissible evidence. The broadcast also supports a reasonable implication that the aired *60 Minutes* excerpts would not be as focused and well-organized without the information discussed in the out-takes. As well, given the military judge's findings and conclusions regarding the broadcast, the whole of its source material cannot, as a threshold matter, be dismissed as merely cumulative of other available information. Among the other evidence reviewed by the military judge, the witness statements he considered did not convey, as does the broadcast, the subjective knowledge, impressions, and thought processes

of the appellee at the time of the alleged offenses. Even the appellee's written statements do not contain substantially the same detailed information as the broadcast excerpts of audio-video footage. On this record, the Government has reasonably demonstrated there is no other non-privileged source for substantially similar evidence. We conclude, therefore, that the Government has met its threshold burden and, on remand, we direct an *in camera* review of the contested audio-video material to determine if it meets the relevance, materiality and necessity requirements of R.C.M. 703.[3] *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

We conclude by noting that, since the military judge made no ruling regarding the privilege claimed by CBS, the issue of whether -- or to what extent -- any privilege exists or applies to the facts of this case is not ripe for our review. We would, therefore, exceed our scope of review under Article 62 were we to consider that issue now. *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994).

Conclusion

The Non-Party CBS Broadcasting Inc. motion to dismiss is denied and the interlocutory appeal of the Government is granted.

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[3] Additionally, the military judge was placed on notice by the appellee that he intended to object to the admission of the *60 Minutes* broadcast on the basis of a lack of completeness. MIL. R. EVID. 106; Record at 26. The rationale, of course, is that the appellee's statements have been taken out of their original context in the editing process. Certainly, the military judge would have to resolve this objection prior to admitting the broadcast into evidence. How he intended to address this is not clear from the record before us. What is clear is that CBS also served notice that, in response to a defense request for access to the out-takes, CBS would again seek to assert privilege over the material. Record at 27. Judicial economy would seem to require all necessary fact-finding about this evidence be completed pre-trial. The *in camera* review ordered herein will serve to address the completeness issue as well, if and when it is raised.

Prior to ruling on the CBS motion to quash, we direct the military judge to conduct additional fact-finding to (1) fully develop the record on the contents of the audio-video material, including an *in camera* review of any material over which CBS asserts privilege; (2) if, based on the facts developed, a determination is made that undisclosed audio-video material is relevant and necessary, the military judge will then develop the factual and legal basis for any CBS refusal to comply with the federal subpoena issued to obtain the material; and (3) taking into consideration protective measures available to the military judge, address whether, and to what extent, any asserted "news-gathering" privilege applies to limit or preclude disclosure of necessary evidentiary audio-video material in this case.

The ruling of the military judge, quashing the Government subpoena, is vacated. The record of trial is returned to the Judge Advocate General of the Navy for submission to the convening authority for further proceedings consistent with the preceding opinion.

Chief Judge O'TOOLE and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX D

1. 10 U.S.C. 810 provides:

Art. 10. Restraint of persons charged with offenses

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

2. 10 U.S.C. 862 provides:

Art. 62. Appeal by the United States

(a) (1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):

(A) An order or ruling of the military judge which terminates the

proceedings with respect to a charge or specification.

(B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

(C) An order or ruling which directs the disclosure of classified information.

(D) An order or ruling which imposes sanctions for nondisclosure of classified information.

(E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.

(F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Criminal Appeals and shall, whenever practicable, have priority over all

other proceedings before that court. In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

3. 18 U.S.C. 3731 provides:

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the

United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

4. Rule for Courts-Martial 707, *Manual for Courts-Martial, United States* (2008 ed.) provides:

Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

(1) Preferral of charges;

Discussion

Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes. *See also* Article 43 (statute of limitations). In some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief. Offenses ordinarily should be disposed of promptly to serve the interests of good order and discipline. Priority shall be given to persons in arrest or confinement.

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(2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or

(3) Entry on active duty under R.C.M. 204.

(b) *Accountability.*

(1) *In general.* The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple Charges.* When charges are

preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) *Events which affect time periods.*

(A) *Dismissal or mistrial.* If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferral and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under the rule shall begin on the earlier of

(i) the date of repreferral;

(ii) the date of imposition of restraint under R.C.M. 304(a)(2)-(4).

(B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

(i) the date of preferral of charges;

(ii) the date on which restraint under R.C.M. 304(a) (2)-(4) is reimposed; or

(iii) the date of entry on active duty under R.C.M. 204.

(C) *Government appeals.* If notice of

appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Criminal Appeals under R.C.M. 908, if there is a further appeal to the Court of Appeals for the Armed Forces or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Appeals for the Armed Forces, or, if appropriate, the Supreme Court.

(D) *Rehearings.* If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

(E) *Commitment of the incompetent accused.* If the accused is committed to the custody of the Attorney General for

hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody.

(c) *Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

Discussion

The decision to grant or deny a reasonable

delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer.

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(2) *Motions.* Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology

should be made a part of the appellate record.

(d) *Remedy.* A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal.* Dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(2) *Sentence relief.* In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

Discussion

See subsection (c)(1) and the accompanying Discussion concerning reasons for delay and procedures for parties to request delay.

(e) *Waiver.* Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense.

Discussion

Speedy trial issues may also be waived by a failure to raise the issue at trial. *See* R.C.M. 905(e) and 907(b)(2).

5. Rule for Courts-Martial 908, *Manual for Courts-Martial, United States* (2008 ed.) provides:

Rule 908. Appeal by the United States

(a) *In general.* In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the disclosure of classified information, or that imposes sanctions for nondisclosure of classified information. The United States may also appeal a refusal by the military judge to

issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

(b) *Procedure.*

(1) *Delay.* After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled to no more than 72 hours under this subsection.

(2) *Decision to appeal.* The decision whether to file notice of appeal under this rule shall be made within 72 hours of the ruling or order to be appealed. If the Secretary concerned so prescribes, the trial counsel shall not file notice of appeal unless authorized to do so by a person designated by the Secretary concerned.

(3) *Notice of appeal.* If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to

be appealed and the charges and specifications affected. Trial counsel shall certify that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(4) *Effect on the court-martial.* Upon written notice to the military judge under subsection (b)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

(B) When trial on the merits has not begun,

(i) a severance may be granted upon request of all the parties;

(ii) a severance may be granted upon request of the accused and when appropriate under R.C.M. 906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) *Record.* Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed. R.C.M. 1103(g), (h), and (i) shall apply and the record shall be authenticated in accordance with R.C.M. 1104(a). The military judge or the Court of Criminal Appeals may direct that additional parts of the proceeding be included in the record; R.C.M. 1104(d) shall not apply to such additions.

(6) *Forwarding.* Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General. The matter forwarded shall include: a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe. The person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Criminal Appeals and notify the trial counsel of that decision.

(7) *Appeal filed.* If the United States elects to file an appeal, it shall be filed directly with the Court of Criminal

Appeals, in accordance with the rules of that court.

(8) *Appeal not filed.* If the United States elects not to file an appeal, trial counsel promptly shall notify the military judge and the other parties.

(9) *Pretrial confinement of accused pending appeal.* If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal under subsection (3) above, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

(c) *Appellate proceedings.*

(1) *Appellate counsel.* The parties shall be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Appellate Government counsel shall diligently prosecute an appeal under this rule.

(2) *Court of Criminal Appeals.* An appeal under Article 62 shall, whenever practicable, have priority over all other proceedings before the Court of Criminal Appeals. In determining an appeal under Article 62, the Court of Criminal Appeals may take action only with respect to matters of law.

(3) *Action following decision of Court of Criminal Appeals.* After the Court of Criminal Appeals has decided any appeal under Article 62, the accused may petition for review by the Court of Appeals for the Armed Forces, or the Judge Advocate General may certify a question to the Court of Appeals for the Armed Forces. The parties shall be notified of the decision of the Court of Criminal Appeals promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the Court of Appeals for the Armed Forces for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Judge Advocate General, who shall forward a copy to the clerk of the Court of Appeals for the Armed Forces when required by the Court. If the decision by the Court of Criminal Appeals permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Appeals for the Armed Forces or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Appeals for the Armed Forces, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Criminal Appeals. If the case is reviewed

by the Court of Appeals for the Armed Forces, R.C.M. 1204 and 1205 shall apply.

(d) *Military judge.* For purposes of this rule, "military judge" does not include the president of a special court-martial without a military judge.

(2)

Supreme Court, U.S.
FILED
AUG 5 - 2009
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No. 08-1133

In the Supreme Court of the United States

FRANK D. WUTERICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 62(a)(1)(B) of the Uniform Code of Military Justice, 10 U.S.C. 862(a)(1)(B), which authorizes the government to appeal a military judge's order that "excludes evidence," encompasses a pretrial order quashing a government-issued subpoena to obtain what is believed to be material evidence.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Grand Jury Empanelled, In re, 597 F.2d 851 (3d Cir. 1979) 5, 8
Grand Jury Subpoena, In re, 175 F.3d 332 (4th Cir. 1999) 7
Grand Jury Subpoena, In re, 646 F.2d 963 (5th Cir. 1981) 8
Grand Jury Subpoena Duces Tecum, In re, 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105 (1997) 7
Kiefaber, In re, 774 F.2d 969 (9th Cir. 1985), vacated as moot, 823 F.2d 383 (9th Cir. 1987) 8
Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 9
United States v. *Brooks*, 42 M.J. 484 (C.A.A.F. 1995) 8
United States v. *Browers*, 20 M.J. 356 (C.M.A. 1985) 5, 8, 9
United States v. *Denedo*, No. 08-267 (June 8, 2009) 10
United States v. *Drogoul*, 1 F.3d 1546 (11th Cir. 1993) 9
United States v. *Lincoln*, 42 M.J. 315 (C.A.A.F. 1995) 8
United States v. *Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) 8
United States v. *Smith*, 135 F.3d 963 (5th Cir. 1998) 7

Cases—Continued: Page

United States v. *True*, 28 M.J. 1 (C.M.A. 1989) 8
United States v. *Watson*, 386 F.3d 304 (1st Cir. 2004) 9
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9, 10

Constitution, statutes and rules:

U.S. Const. Amend. I 3
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
10 U.S.C. 862 (Art. 62) 4, 5, 6, 8, 9, 10
10 U.S.C. 862(a)(1)(B) (Art. 62(a)(1)(B)) ..... *passim*
10 U.S.C. 862(a)(2) (Art. 62(a)(2)) 4, 10
10 U.S.C. 862(a)(3) 10
10 U.S.C. 862(b) 10
10 U.S.C. 862(c) 10
10 U.S.C. 892 (Art. 92) 2
10 U.S.C. 919 (Art. 119) 2
10 U.S.C. 928 (Art. 128) 2
10 U.S.C. 934 (Art. 134) 2
18 U.S.C. 3731 ..... 5, 6, 7, 8, 9
Fed. R. Evid. 403 7
Rules for Courts-Martial:
Rule 703 3
Rule 703(f)(1) 3
Rule 707(b)(3)(C) 10
Rule 908(b)(3) 4

Miscellaneous: Page

S. Rep. No. 53, 98th Cong., 1st Sess. (1983) 8

In the Supreme Court of the United States

No. 08-1133

FRANK D. WUTERICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-50a) is reported at 67 M.J. 63. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 52a-65a) is reported at 66 M.J. 685.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2008. A petition for reconsideration was denied on December 12, 2008 (Pet. App. 51a). The petition for a writ of certiorari was filed on March 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a staff sergeant in the United States Marine Corps, is charged with dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice, in violation of Articles 92, 119, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 919, 928, and 934. Pet. App. 4a. The government issued a pretrial subpoena to the CBS Broadcasting Company (CBS). The military judge quashed the subpoena. *Id.* at 5a-9a. The government appealed that ruling to the Navy-Marine Corps Court of Criminal Appeals (N-MCCA) under UCMJ Article 62(a)(1)(B), 10 U.S.C. 862(a)(1)(B). Pet. App. 9a. The N-MCCA vacated and remanded. *Id.* at 52a-65a. The United States Court of Appeals for the Armed Forces (CAAF) vacated and remanded. *Id.* at 1a-50a.

1. On November 19, 2005, petitioner led a squad of Marines on a convoy patrol in Haditha, Iraq. A roadside bombing killed one Marine and wounded others. In the aftermath of that bombing, the convoy's response resulted in the deaths of numerous Iraqi civilians. Pet. App. 3a-4a, 53a.

Following a military investigation, petitioner was charged with various crimes under the UCMJ, including dereliction of duty and voluntary manslaughter, in connection with the deaths of the Iraqi civilians. In October 2006, after being charged, petitioner was interviewed by Scott Pelley, a correspondent for the CBS television program *60 Minutes*. On March 18, 2007, *60 Minutes* broadcast a half-hour segment entitled "The Killings in Haditha" that included parts of Pelley's interview of petitioner. Pelley explained that petitioner had agreed to be interviewed because he wanted "to tell the truth"

about his role in the killings. The program aired only a small portion of the several hours of interview footage. Pet. App. 4a-5a, 53a.

2. On January 16, 2008, the government, pursuant to Rule for Courts-Martial (R.C.M.) 703, issued a subpoena to CBS for all audio and videotapes of petitioner's statements that were in CBS's possession. The government asserted that petitioner's statements would be admissible as party admissions under the military rules of evidence. Pet. App. 5a-6a.

CBS moved to quash the subpoena on the grounds that it was unreasonable and oppressive under the First Amendment and military law. The government opposed. Petitioner initially took no position, but later indicated that he would object if the government sought to admit into evidence petitioner's aired statements only. The military judge viewed the *60 Minutes* segment, but he did not review the unaired outtakes that were the basis of the government's subpoena. Pet. App. 6a-8a.

The military judge quashed the subpoena for lack of necessity under R.C.M. 703(f)(1). The military judge stated that the contents of petitioner's statements in the outtakes were speculative and that the statements would be cumulative to petitioner's statements already possessed by the government. The government moved for reconsideration of the ruling and moved the military judge to conduct an in camera review of the disputed statements to determine whether they were cumulative, inasmuch as the military judge had not reviewed the subpoenaed material. The military judge denied the motion without explanation. Pet. App. 8a-9a.

3. Relying on UCMJ Article 62(a)(1)(B), the government appealed. Article 62(a)(1)(B) provides that the government may appeal "[a]n order or ruling which ex-

cludes evidence that is substantial proof of a fact material in the proceeding." 10 U.S.C. 862(a)(1)(B).[1] Petitioner and CBS opposed the government's appeal on both jurisdiction and the merits.

The N-MCCA ruled that the military judge's pretrial order was appealable under Article 62(a)(1)(B) as an order that "excludes evidence." Pet. App. 52a-57a. It also ruled that petitioner, unlike CBS, lacked standing to participate in the appeal. *Id.* at 57a-58a. On the merits, the N-MCCA vacated the ruling below on the ground that the military judge abused his discretion in quashing the subpoena on cumulativeness grounds without first conducting an in camera review of the evidence. *Id.* at 60a-65a.

4. The CAAF vacated the decisions below and remanded. Pet. App. 1a-50a.

As an initial matter, the CAAF held that petitioner had standing to participate in the appeal. Pet. App. 13a-14a.

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[1] Article 62 states, in relevant part:

> (a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):
>
> * * * * *
>
> (B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

10 U.S.C. 862. Pursuant to Article 62(a)(2), the government must certify that "the evidence excluded is substantial proof of a fact material in the proceeding." 10 U.S.C. 862(a)(2); accord R.C.M. 908(b)(3). The government did so in this case. Pet. App. 57a.

As to appellate jurisdiction, the CAAF held that the order quashing the subpoena was appealable under Article 62(a)(1)(B) as an order that "excludes evidence." The CAAF explained that Congress enacted Article 62 against a legal landscape that requires government appeals to be authorized by statute. Pet. App. 15a-16a. It further explained that Congress had modeled Article 62 on 18 U.S.C. 3731 and intended that military courts interpreting Article 62 would be guided by federal-court precedent interpreting analogous Section 3731—though federal authorities would not always control in light of Section 3731's "liberal construction" clause.[2] Pet. App. 17a-19a. The CAAF stated that the statutory term "excludes evidence" in Article 62(a)(1)(B) was similar to the term "suppressing or excluding evidence" in Section 3731. It then noted that federal courts of appeals had concluded that the term "excluding evidence" included an order quashing a grand jury subpoena. Pet. App. 20a-22a (citing, *e.g.*, *In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 856 (3d Cir. 1979)).

The CAAF distinguished its prior decision in *United States* v. *Browers*, 20 M.J. 356 (C.M.A. 1985), which held that an order denying a continuance was not an order that "excludes evidence" under Article 62(a)(1)(B). The

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[2] Section 3731 provides, in relevant part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence * * * if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. * * * The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C. 3731.

court distinguished *Browers* on the ground that *Browers* had involved a trial scheduling issue, not an order excluding evidence. The CAAF also stated that *Browers* did not prevent it from relying on federal cases interpreting Section 3731. Pet. App. 22a-27a. The court concluded that the military judge's order "was appealable under Article 62, UCMJ, because it had a direct effect on whether the outtakes would be excluded from consideration at the court-martial." *Id.* at 29a-30a.

On the merits, the CAAF held that petitioner's statements in the outtakes "constitute a potentially unique source of evidence that is not necessarily duplicated by any other material." Pet. App. 34a. The court held that the military judge thus abused his discretion in quashing the subpoena without first conducting an in camera review of the subpoenaed material to determine whether petitioner's statements were cumulative. *Id.* at 30a-34a. The CAAF directed the military judge on remand to conduct an in camera inspection of the subpoenaed material and to consider any claim of privilege raised by CBS. *Id.* at 34a-36a.

Judge Ryan, joined by Judge Erdmann, dissented on appellate jurisdiction. In their view, the "excludes evidence" language in Article 62(a)(1)(B) does not include the quashing of a subpoena. Under *Browers*, they argued, the CAAF had adopted a narrow interpretation of Article 62 in which the test is whether the military judge's order rendered the evidence "inadmissible." They also contended that the federal grand-jury subpoena cases were inapposite because those cases relied on Section 3731's "liberal construction" clause and that the majority's decision would threaten the speedy trial rights of soldiers. Pet. App. 36a-50a.

ARGUMENT

Petitioner contends (Pet. 8-14) that UCMJ Article 62(a)(1)(B) does not authorize a government appeal from a military judge's pretrial order quashing a subpoena. The CAAF's decision correctly reached a result consistent with the rule in federal court under 18 U.S.C. 3731, and its decision does not conflict with another decision of the CAAF or any other court. Court-martial proceedings since the CAAF's decision also may render the underlying dispute moot. Further review of the CAAF's interlocutory decision is therefore unwarranted.

1. a. The CAAF's ruling that an order quashing a subpoena is an order that "excludes evidence" within the meaning of Article 62(a)(1)(B) is correct. The practical effect of the military judge's order was to exclude petitioner's pretrial statements from the court-martial. In both common parlance and legal usage, an order that prevents evidence from being introduced at trial on the ground that it is cumulative to other evidence is an order that excludes that evidence. See Fed. R. Evid. 403 (providing that cumulative evidence may be "excluded").

The CAAF's interpretation of the "excludes evidence" language of Article 62(a)(1)(B) is consistent with federal appellate decisions construing the analogous "suppressing or excluding evidence" language of 18 U.S.C. 3731. In *United States* v. *Smith*, 135 F.3d 963, 967 (1998), the Fifth Circuit held that Section 3731 authorized a government appeal from a pretrial order quashing a subpoena to a television station for statements of the defendant. Other federal courts of appeals have held that an order quashing a grand-jury subpoena is appealable under Section 3731. See, *e.g.*, *In re Grand Jury Subpoena*, 175 F.3d 332, 336-337 (4th Cir. 1999); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910,

914 (8th Cir.), cert. denied, 521 U.S. 1105 (1997); *In re Kiefaber*, 774 F.2d 969, 972-973 (9th Cir. 1985), vacated as moot, 823 F.2d 383 (9th Cir. 1987); *Colucci*, 597 F.2d at 855-856 (3d Cir.); see also *In re Grand Jury Subpoena*, 646 F.2d 963, 967-968 (5th Cir. 1981).

The CAAF properly relied on those cases. The legislative history of Article 62 confirms that Congress intended for the CAAF to rely on analogous federal-court decisions. Congress modeled Article 62 on Section 3731. The phrase "excludes evidence" in Article 62(a)(1)(B) is virtually identical to the "excluding evidence" text in Section 3731. Further, Congress expressly stated that Article 62 would permit an appeal "under procedures similar to an appeal by the United States in a federal civilian prosecution" and that Article 62 "[t]o the extent practical * * * parallels 18 U.S.C. § 3731." S. Rep. No. 53, 98th Cong., 1st Sess. 6, 23 (1983). The CAAF itself has consistently recognized the interpretive relationship between the two provisions. See Pet. App. 17a-18a; see also, *e.g.*, *United States* v. *Lopez de Victoria*, 66 M.J. 67, 70-71 (C.A.A.F. 2008); *United States* v. *Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995); *United States* v. *Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995); *United States* v. *True*, 28 M.J. 1, 3 (C.M.A. 1989); *United States* v. *Browers*, 20 M.J. 356, 359 (C.M.A. 1985).

Petitioner, echoing the dissent, contends (Pet. 9-10) that the absence in Article 62 of the clause in 18 U.S.C. 3731 that "[t]he provisions of this section shall be liberally construed" means that Article 62 must be interpreted more narrowly. Even if so, not all the federal appellate decisions rely on the "liberal construction" clause of Section 3731 in concluding that an order quashing a subpoena is immediately appealable. Indeed, in *Smith*, the case most factually and procedurally similar

to this one, the Fifth Circuit did not even mention it. Moreover, a "liberal construction" clause in a federal criminal statute merely "seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply [the statute] to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation." *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-184 (1993). The CAAF's ruling that Article 62(a)(1)(B) covers an order quashing a trial subpoena was not at the outer reaches of the statute, and therefore the CAAF did not have to rely on a "liberal construction" clause to justify its holding.

b. Contrary to petitioner's contention (Pet. 8), the CAAF's decision does not conflict with its prior decision in *Browers*. In *Browers*, the Court of Military Appeals (the predecessor to the CAAF) held that a trial judge's denial of a continuance was not an order "exclud[ing] evidence" under Article 62(a)(1)(B). 20 M.J. at 360. In this case, the CAAF properly distinguished *Browers* on the ground that the denial of a continuance in that case did not exclude evidence because it merely affected the scheduling of a trial. The First Circuit drew a similar distinction in *United States* v. *Watson*, 386 F.3d 304 (2004), holding that the denial of a continuance (where the government sought time to take a foreign deposition) was not appealable under Section 3731, while acknowledging that denial of an order authorizing foreign depositions was immediately appealable under Section 3731. *Id.* at 312 (citing *United States* v. *Drogoul*, 1 F.3d 1546 (11th Cir. 1993)). In any event, this Court does not grant review to decide whether a court of appeals has

properly applied its own precedents. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). That principle is equally valid with respect to any internal tension among CAAF precedents.

c. Petitioner's contention (Pet. 11-13) that this case warrants further review because the CAAF's interpretation of Article 62 threatens efficiency and the speedy trial rights of soldiers is also unfounded. Any interlocutory appeal authorized by Article 62 causes a trial delay; that is not an issue unique to orders quashing a subpoena. More importantly, military law has adequate safeguards to prevent interlocutory appeals by the government from becoming too numerous or from violating the speedy trial rights of soldiers. As noted above (note 1, *supra*), the government may pursue an appeal under Article 62(a)(1)(B) only if it certifies that "the evidence excluded is substantial proof of a fact material in the proceeding." 10 U.S.C. 862(a)(2). That requirement necessarily limits the pool of such appeals. Moreover, Article 62 prescribes that such appeals "shall be diligently prosecuted" and "shall, whenever practicable, have priority over all other proceedings." 10 U.S.C. 862(a)(3) and (b). Although R.C.M. 707(b)(3)(C) provides that the 120-day clock ordinarily will be reset after a government appeal, it (like Article 62(c), 10 U.S.C. 862(c)) specifies that the delay caused by such an appeal will not be excluded if it was taken solely for purposes of delay and with knowledge that the appeal was frivolous and without merit.

2. Petitioner suggests (Pet. 13-14), in the alternative, that this Court hold his petition for *United States* v. *Denedo*, No. 08-267, which was decided on June 8, 2009. In *Denedo*, the Court held that the military appellate courts have statutory jurisdiction under the UCMJ to

hear a petition for a writ of error coram nobis filed by a former service member whose conviction had become final. Slip op. 5-13. The Court's decision in *Denedo* affords no assistance to petitioner's argument and in no way impinges on the correctness of the CAAF's decision upholding appellate jurisdiction in this case.

3. Because this case involves the pretrial quashing of a subpoena, this case is in an interlocutory posture. Arguably, the decision whether interlocutory jurisdiction for the government's appeal existed is, itself, final. But the underlying dispute involving the evidence sought by the subpoena is the subject of ongoing proceedings, which strongly counsels against review. The CAAF's decision required the military judge to review the subpoenaed interview outtakes in camera. Pet. App. 34a-36a. Although the military judge on remand concluded that some of the subpoenaed footage was material, he quashed the subpoena on another ground (*i.e.*, newsgathering privilege). See 3/12/09 Tr. 46-53. An appeal of that ruling is currently pending before the N-MCCA. If the military judge's ruling is upheld, this Court's resolution of the question presented would have no impact on this case. Even if the government's pending appeal is successful and the subpoena ultimately executed, petitioner might later be acquitted at his court-martial—thereby obviating petitioner's need for the Court's intervention. The question concerning CAAF's jurisdiction over interlocutory appeals is not so pressing as to warrant review when the underlying evidentiary dispute may be mooted by later events.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-1133

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FRANK D. WUTERICH,
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UNITED STATES OF AMERICA
Respondent.

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to the United States Court of Appeals
for the Armed Forces

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

A. The CAAF's decision conflicts with Article 62's plain language 3

B. Case law construing the materially different federal civilian prosecution appeal statute is inapposite 6

C. The question presented is important and warrants this Court's review 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Bowen v. Massachusetts, 487 U.S. 879 (1988) 4

Clinton v. Goldsmith, 526 U.S. 529 (1990) 2

Comm'r v. McCoy, 484 U.S. 3 (1987) 5

Denedo v. United States, 66 M.J. 114 (C.A.A.F. 2008) 8

Goldsmith v. Clinton, 48 M.J. 84 (C.A.A.F. 1998) 2

Kreutzer v. United States, 60 M.J. 453 (C.A.A.F. 2005) 1, 2

Loving v. United States, 68 M.J. 1 (C.A.A.F. 2009) 1

Loving v. United States, 62 M.J. 235 (C.A.A.F. 2005) 2

Solorio v. United States, 476 U.S. 1181 (1986).....9

United States v. Browers, 20 M.J. 356 (C.M.A. 1985).....6

United States v. Denedo, 129 S. Ct. 2213 (2009).....1-2, 3

United States v. Denedo, 129 S. Ct. 622 (2008).....9

United States v. Leak, 61 M.J. 234 (C.A.A.F. 2005).....1-2

United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008) 1, 2, 6

United States v. Rodriguez, 67 M.J. 110 (C.A.A.F. 2009) 2

United States v. Sanges, 144 U.S. 310 (1892) 6

United States v. Tamez, 63 M.J. 201 (C.A.A.F. 2006).....2

United States v. Wilson, 420 U.S. 332 (1975).....6

United States v. Wuterich, __ M.J. __, No. NMCCA 200800183 (N-M. Ct. Crim. App. Aug. 31, 2009) (en banc) 9, 10

Statutes

National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) 5-6

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:

10 U.S.C. 862 (Article 62) ..... *passim*

10 U.S.C. 876 (Article 76) 1

18 U.S.C. 3731 ..... 3, 5, 6

Rule

Rule for Courts-Martial 908, *Manual for Courts-Martial, United States* (2008 ed.) 7

Miscellaneous

3A Norman J. Singer, *Statutes and Statutory Construction* (6th ed. 2000) 4

Petition for Certiorari, *United States v. Denedo*, 129 S. Ct. 2213 (2009) (No. 08-267), 2008 WL 5693433 ..... 2, 6

S. Rep. No. 53, 98th Cong., 1st Sess. (1983) 5

IN THE
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FRANK D. WUTERICH,
Staff Sergeant, United States Marine Corps,
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REPLY BRIEF FOR THE PETITIONER

The decision below was one of a long line of divided Court of Appeals for the Armed Forces (CAAF) rulings broadly construing military appellate courts' jurisdiction.[1] In *United States v. Denedo*, 129

[1] *See, e.g., Loving v. United States*, 68 M.J. 1 (C.A.A.F. 2009) (asserting the CAAF's habeas jurisdiction after military appellate review became final under Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 876); *United States* v. *Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (asserting the CAAF's jurisdiction over intermediate military appellate courts' rulings on prosecution appeals); *Kreutzer v. United States*, 60 M.J. 453 (C.A.A.F. 2005) (issuing writ of mandamus to compel change in confinee's custodial status); *United States v. Leak*, 61 M.J. 234

S. Ct. 2213 (2009), this Court reviewed one such divided CAAF opinion dealing with the temporal length of that court's jurisdiction to review cases. This case, on the other hand, deals with the breadth of the military appellate courts' jurisdiction. The United States itself has objected to the CAAF's repeated "efforts to expand its role beyond its congressionally prescribed jurisdiction to 'review * * * specified sentences imposed by courts-martial.'" Petition for Certiorari at 24, *United States v. Denedo*, 129 S. Ct. 2213 (2009) (No. 08-267), 2008 WL 5693433 (alteration in original) (quoting *Clinton* v. *Goldsmith*, 526 U.S. 529, 534 (1999)).[2]

In its decision below, the CAAF construed statutory language authorizing a prosecution appeal of a trial-level ruling "which excludes evidence"[3] to allow the appeal of an order quashing a subpoena. That decision's interpretation of the military justice system's prosecution appeal statute conflicts with the statute's plain meaning and relies on Article III courts' opinions construing a materially different statute. Given the frequency with which the CAAF has issued divided opinions concerning the breadth of military appellate courts' jurisdiction and the United States' own concern that many of those opinions overstepped the CAAF's jurisdictional

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(C.A.A.F. 2005) (asserting the CAAF's jurisdiction over a finding of guilty set aside pursuant to a Court of Criminal Appeals' special statutorily authorized factual insufficiency review).

[2] In support of this argument, the United States cited *Lopez de Victoria*, 66 M.J. 67; *United States v. Tamez*, 63 M.J. 201 (C.A.A.F. 2006), *overruled by United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009); *Loving* v. *United States*, 62 M.J. 235 (C.A.A.F. 2005); *Kreutzer*, 60 M.J. 453; and *Goldsmith* v. *Clinton*, 48 M.J. 84 (C.A.A.F. 1998), *rev'd*, 526 U.S. 529 (1999).

[3] 10 U.S.C. 862(a)(1)(B) (2000).

limits, review is appropriate to provide the CAAF with further guidance concerning the proper construction of military appellate courts' jurisdiction-granting statutes.

Respondent counters that the CAAF correctly ruled that an order quashing a subpoena is an order that "excludes evidence" for purposes of Article 62(a)(1)(B) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 862(a)(1)(B). In reaching this conclusion, however, Respondent relies on the ruling's supposed "practical effects" rather than its actual terms, thereby violating the principle that statutes will not be construed to grant jurisdiction by implication. Respondent also relies on precedent construing 18 U.S.C. 3731, the federal civilian prosecution appeal statute. But unlike 18 U.S.C. 3731, Article 62 of the UCMJ does not include a liberal construction clause. Respondent also argues that this case's interlocutory status renders certiorari inappropriate. But a portion of Respondent's argument is now obsolete due to subsequent events. Additionally, this Court has granted certiorari to review jurisdictional challenges to other CAAF rulings despite their interlocutory nature, including at the United States' request in the recent case of *United States v. Denedo*, 129 S. Ct. 2213 (2009). Certiorari is similarly appropriate here to review the CAAF's decision on an important issue concerning the military appellate courts' jurisdiction.

A. The CAAF's decision conflicts with Article 62's plain language

1. Article 62(a) of the UCMJ allows the prosecution to appeal a ruling that "excludes evidence." 10 U.S.C. 862(a). Contrary to

Respondent's argument, Opp. 7, the trial judge did not exclude the evidence sought by the prosecution's subpoena. Rather, the trial judge expressly declined to rule on whether the evidence that the prosecution sought with its subpoena would be admissible if a party were to offer it. *See* Pet. App. 36a & 36a n.1 (Ryan, J., dissenting). While the trial judge quashed the prosecution's subpoena, he never suggested that the subpoenaed materials could not be admitted if the prosecution obtained them by other means.

2. Rather than relying on the challenged ruling's actual terms, Respondent discusses its "practical effect." Respondent argues that the "practical effect of the military judge's order was to exclude petitioner's pretrial statements from the court-martial." Opp. 7. This argument fails for two reasons. First, concluding that an appellate court has jurisdiction to review a ruling based on its "practical effect" rather than its actual terms would offend the canon of statutory construction that "jurisdiction of courts is neither granted nor assumed by implication." 3A Norman J. Singer, *Statutes and Statutory Construction* § 67.3 (6th ed. 2000). Respondent appears to suggest that while the trial judge's ruling does not fall within Article 62's plain meaning, Congress impliedly included it within Article 62's scope because its effects are similar to those of rulings that do fall within Article 62. That argument should be rejected when construing a jurisdiction-granting statute that does not include a liberal construction clause. And such a jurisdiction-by-implication argument is particularly inappropriate when construing a statute granting jurisdiction to an Article I court, since such statutes are to be construed strictly. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 908-09 n.46 (1988);

Comm'r v. McCoy, 484 U.S. 3, 7 (1987) (per curiam). Second, as Judge Ryan observed below, had it stood, the trial judge's ruling might not have had the practical effect of excluding the subpoenaed materials from Petitioner's court-martial; further negotiations might have resulted in CBS News providing some or all of the outtakes to the prosecution. *See* Pet. App. 47a (Ryan, J., dissenting).

3. Quoting a Senate committee report, Respondent contends that "Congress expressly stated that Article 62 would permit an appeal 'under procedures similar to an appeal by the United States in a federal civilian prosecution' and that Article 62 '[t]o the extent practical * * * parallels 18 U.S.C. § 3731.'" Opp. 8 (alterations in original) (quoting S. Rep. No. 53, 98th Cong., 1st Sess. 6, 23 (1983)). But Congress does not speak through a committee report of a single house. Rather, Congress speaks through statutes. The federal civilian and military prosecution appeal statutes are different in a key respect: the former includes a liberal construction clause while the latter does not. *Compare* 18 U.S.C. 3731 *with* 10 U.S.C. 862. Even if it were appropriate to examine Article 62's legislative history to construe its terms, the report suggests that the Senate Armed Services Committee considered a liberal construction mandate impractical for the military's prosecution appeal statute since Article 62 departs from its 18 U.S.C. 3731 model by omitting such a clause.

4. Respondent appears to erroneously suggest that Petitioner argued that this Court should grant certiorari due, in part, to the conflict between the opinion below and the Court of Military Appeals'[4]

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[4] The Court of Military Appeals is the CAAF's former name. Congress changed the court's name in 1994. *See* National

earlier decision in *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985). Opp. 9-10. Petitioner discussed *Browers* due to its compelling plain language analysis of Article 62(a). *See* Pet. 8, 11. This Court should grant certiorari not because the opinion below conflicted with *Browers*, but rather because the opinion below conflicted with the plain meaning of a congressional statute as demonstrated by *Browers*.

B. Case law construing the materially different federal civilian prosecution appeal statute is inapposite

Respondent seeks to rely on Article III case law construing 18 U.S.C. 3731. Opp. 7. That statute, however, includes a liberal construction mandate that Congress did not include in Article 62. Case law construing 18 U.S.C. 3731 is, therefore, irrelevant to Article 62's proper construction. When Congress omitted a liberal construction clause from the military's prosecution appeal statute, it left intact the general rule that "the Government [cannot] take an appeal in a criminal case without express statutory authority." *United States v. Wilson*, 420 U.S. 332, 336 (1975) (citing *United States v. Sanges*, 144 U.S. 310 (1892)). In arguing to the contrary, the United States relies, in part, on a CAAF decision that it had previously contended was wrongly decided. *Compare* Opp. 8 (citing *Lopez de Victoria*, 66 M.J. at 70-71) *with* Petition for Certiorari at 24, *United States v. Denedo*, 129 S. Ct. 2213 (2009) (No. 08-267), 2008 WL 5693433 (characterizing *Lopez de Victoria* as a case in which the CAAF "expand[ed] its

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Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994).

role beyond its congressionally prescribed jurisdiction").

C. The question presented is important and warrants this Court's review

1. Construing Article 62 overly broadly harms both the military's interest in efficiency and service members' speedy trial rights. Respondent's argument to the contrary is internally inconsistent. First, Respondent posits that any argument that the "CAAF's interpretation of Article 62 threatens efficiency and the speedy trial rights of soldiers is also unfounded." Opp. 10. Respondent then appears to concede that such a threat does exist when it observes that "[a]ny interlocutory appeal authorized by Article 62 causes a trial delay." *Id.* That is precisely why it is imperative that Article 62 not be construed more broadly than its plain language dictates.

2. This case demonstrates both the interference with military efficiency and the threat to service members' trial rights that can occur as the result of a prosecution appeal. While a prosecution appeal is pending before one of the military's intermediate appellate courts, trial-level proceedings are automatically stayed. Rule for Courts-Martial 908(b)(4), *Manual for Courts-Martial, United States* (2008 ed.). Petitioner's court-martial has been halted for more than 18 months by two successive prosecution appeals. The second prosecution appeal was entirely an outgrowth of the CAAF's failure to dismiss the first on jurisdictional grounds. Upon remand of the first prosecution appeal, the trial judge held that the outtakes the United States sought from CBS News were protected by a

newsgathering privilege. The United States appealed that ruling, resulting in a second stay in Petitioner's court-martial, and an intermediate appellate court recently reversed it. Had the CAAF held that Article 62 does not permit a prosecution appeal of an order quashing a subpoena, the proceedings that led to the second prosecution appeal would not have occurred and Petitioner's court-martial would no doubt have been resolved long ago.

Congress designed the military justice system to simultaneously foster good order and discipline and protect service members' rights. *See Denedo v. United States*, 66 M.J. 114, 123 (C.A.A.F. 2008), *aff'd*, 129 S. Ct. 2213 (2009). Both of those goals are thwarted if a UCMJ provision is construed overly broadly with the effect of delaying resolution of a court-martial for a year-and-a-half. A desire to minimize such ill effects likely explains why Congress omitted from Article 62 the liberal construction clause that it included in the federal civilian prosecution appeal statute. The negative consequences that prosecution appeals impose on the military and individual service members—negative consequences that will be reduced if this Court were to conclude that the CAAF opened the door for military prosecution appeals too broadly—provide further support for granting certiorari.

3. This case's interlocutory posture does not warrant denial of the petition. Respondent's argument that the ongoing proceedings in Petitioner's case counsel against review was based, in part, on the possibility that the trial judge's second order quashing the subpoena—this time on newsgathering privilege grounds—might be upheld on appeal. Opp. 11. Since Respondent filed its reply, however, the Navy-Marine Corps Court of Criminal

Appeals rejected the applicability of any newsgathering privilege to the military justice system and reversed the trial judge's ruling quashing the subpoena. *United States v. Wuterich*, __ M.J. __, No. NMCCA 200800183 (N-M. Ct. Crim. App. Aug. 31, 2009) (en banc) [hereinafter *Wuterich III*]. But CBS News is unlikely to acquiesce to a military intermediate appellate court's decision. Rather, it will likely pursue relief from other courts either within or outside the military justice system. The resulting delay will further undermine the military's interest in efficiency and Petitioner's interest in seeking a prompt acquittal.

Nor does the possibility of an acquittal once court-martial proceedings finally resume render certiorari inappropriate. A year ago, this Court granted the United States' petition for certiorari in *Denedo* even though the CAAF had remanded the case for further proceedings that might have resulted in the denial of former-Petty Officer Denedo's petition for a writ of error coram nobis. *United States v. Denedo*, 129 S. Ct. 622 (2008). Similarly, in *Solorio v. United States*, this Court granted certiorari to review a subject-matter jurisdiction challenge to Petty Officer Solorio's court-martial even though the Court of Military Appeals had remanded the case for trial, which could have resulted in his acquittal. *Solorio v. United States*, 476 U.S. 1181 (1986). Here, too, the jurisdictional question presented is sufficiently important to consider regardless of the possibility that Petitioner ultimately might be acquitted.

4. In the Navy-Marine Corps Court's recent ruling on the second prosecution appeal in this case,

three of the court's eight judges who participated in the en banc decision endorsed Judge Ryan's dissent from the CAAF's *Wuterich* opinion and declared that they "are troubled by the attenuation of the jurisdictional predicate of Article 62 to encompass questions of discoverability." *Wuterich III*, slip op. at 24 (Perlak, J., concurring in the result). Another two judges concluded that the quashals in this case were appealable, but expressed "grave concern at the continued expansion of Article 62." *Id.*, slip op. at 23 (Maksym, J., concurring).

These judicial expressions of concern—raised after both the CAAF's *Wuterich* opinion and this Court's *Denedo* opinion—highlight the continuing importance of the question presented. The military justice system's judiciary is calling out for additional guidance concerning the breadth of military appellate courts' jurisdiction. This Court should grant certiorari to provide that guidance.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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